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2570  
No. 11,872

IN THE  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

*see vol. 2519*  
CONSTANCIO R. ALESNA, JOSE BAGOGO  
BERNAL, DANIEL RODRIGUES FER-  
REIRA, YUTAKA GOHARA, CORNEL  
IHA, MASASHI KAGEYAMA, TOROI-  
CHI KANDA, FRANK GONSALVES  
PERREIRA, NOBORU TAKEUCHI, FRED  
TANIGUCHI and GENKICHI WADA,  
*Appellants,*

vs.

PHILIP L. RICE, as Judge of the Cir-  
cuit Court for the Fifth Judicial  
Circuit of the Territory of Hawaii,  
and WALTER D. ACKERMAN, JR., as  
Attorney General of the Territory  
of Hawaii,  
*Appellees.*

Upon Appeal from the United States District Court for the  
District of Hawaii.

APPELLANTS' OPENING BRIEF.


**FILED**  
JUL 28 1948

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IN THE  
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**For the Ninth Circuit**

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CONSTANCIO R. ALESNA, JOSE BAGOGO  
BERNAL, DANIEL RODRIGUES FER-  
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*Appellants,*

vs.

PHILIP L. RICE, as Judge of the Cir-  
cuit Court for the Fifth Judicial  
Circuit of the Territory of Hawaii,  
and WALTER D. ACKERMAN, JR., as  
Attorney General of the Territory  
of Hawaii,

*Appellees.*

Upon Appeal from the United States District Court for the  
District of Hawaii.

**APPELLANTS' OPENING BRIEF.**

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**STATEMENT OF JURISDICTION.**

This is an appeal from a judgment and decree of  
the United States District Court for the District of

Hawaii, summarily dismissing, before hearing on the merits, appellants' complaint for injunction and dissolving an injunction *pendente lite* theretofore issued by the Court against the appellee Attorney General, his deputies and representatives. (R. 344.)

Appellants' complaint (R. 5) was brought in the District Court under Section 41, subdivision (14) of Title 28 of the United States Code, conferring jurisdiction on that court of suits, at law or in equity, authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any state of any right, privilege or immunity secured by any law of the United States providing for equal rights of citizens.<sup>1</sup>

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<sup>1</sup>The District Court in its ruling on appellants' motion for a preliminary injunction held it had jurisdiction under Section 41 (14) of Title 28 of the U. S. Code. (R. 54.) Eight months after this ruling, a specially constituted three judge court under Section 266 of the Judicial Code (28 U.S.C. Section 380) in the case of *Mo Hock Ke Lok Po, et al. v. Ingram M. Stainback, et al.*, 74 Fed. Supp. 852, reached a contrary conclusion, holding that Section 41 (14) of Title 28 did not confer jurisdiction on the Federal District Court for the Territory of Hawaii of a case involving deprivation of federal rights under color of Territorial law, and therefore, jurisdiction in such cases in the Territory must rest on Section 41 (1).

In the light of the *Po* case, the District Court in the instant case requested the parties to consider the correctness of its prior holding that Civil Rights Act remedies were available in the Territory under Section 41 (14). Counsel for both parties briefed and argued the question exhaustively, and both agreed that the Civil Rights Act applies in the Territory and that the word "state" in Section 41 (14) should not be narrowly interpreted to exclude the Territory of Hawaii. The parties agreed, and the District Court held (R. 314, 317-318), that to do so would be to mutilate and defeat the express intention of Congress in Section 43 of Title 8 of the U. S. Code which provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United

Appellants sought in their complaint an injunction restraining the appellees from all further proceedings in the Circuit Court of the Fifth Judicial Circuit of the Territory of Hawaii under an indictment in two counts against the appellants charging them in one count with picketing in groups larger than three, and in the second count with mass picket-

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States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. (*Italics ours.*)

By this section, Congress clearly created a substantive Federal right for persons deprived of rights under color of Territorial law. Federal courts have never permitted substantive federal rights to be defeated for lack of a remedy. *Kiefer & Kiefer v. Reconstruction Finance Corporation*, 306 U.S. 381, 389 (1939); *Texas & N.O.R. Railway Company v. Railway Clerks*, 281 U.S. 548, 568 (1930); *United States v. Hutcheson*, 312 U.S. 219 (1941); and see particularly the case of *Bell v. Hood*, 327 U.S. 768, where the Court said:

\* \* \* and it is well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

The Court in the *Po* case suggested that Congress intended to leave redress of rights under the Civil Rights Act to Territorial Courts where the amount involved was less than \$3,000. Such a construction would, however, in some instances, as here, result in absurdity since the application for redress might have to be made to the territorial judge who plaintiff contended had deprived him of his federal and constitutional rights. See *Screws v. United States*, 315 U.S. 91, 98 (1945); *Picking v. Pennsylvania* (C.C.A. 3), 151 F. (2d) 240 (1945).

In support of the correctness of District Court's holding that the word "state" as used in Section 41 (14) includes the Territory of Hawaii, as against contrary holding in the *Po* case, see *Andres v. Territory of Hawaii*, 92 L. ed. Adv. Sheets 790 (decided April 26, 1948). There the Court said:

The petitioner contends that the phrase "laws of the State" limits the statute to the forty-eight states and consequently provides for no method of inflicting the death penalty where sentence is imposed by a district court sitting in a Territory. We reject that contention as being without merit. In many contexts "state" may mean only the several states of the United States. Here, however, we hold that its meaning includes the Territory of Hawaii.



ing, which alleged conduct was charged to be in violation of an amended ex parte temporary restraining order issued by the appellee judge of the Territorial Circuit Court.

Appellants alleged that the appellees had injured, oppressed and intimidated them in the free exercise and enjoyment of rights guaranteed by the First Amendment, Sections 1 and 20 of the Clayton Act (29 U.S.C. 52 and 53), and the Norris-LaGuardia Act (29 U.S.C. 101-115), and threatened, unless restrained, to continue in their unlawful conduct.

Jurisdiction of this Court is conferred by Section 128 of the Judicial Code (28 U.S.C. Section 225) conferring jurisdiction on this Court of Appeals from final decisions of the United States District Court for the District of Hawaii in all cases.

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#### **STATUTES INVOLVED.**

Sections 1 and 20 of the Clayton Act (29 U.S.C. 52 and 53) and the Norris-LaGuardia Act (29 U.S.C. 101-115) are printed in full in the appendix, *infra*.

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#### **STATEMENT OF CASE.**

The appellants brought this action under Section 41 (14) of Title 28 of the United States Code giving Federal District Courts jurisdiction of suit brought under the Civil Rights Act. The right of action of the individual plaintiffs is conferred under Section 43 of

Title 8 of the United States Code which gives a cause of action to every person deprived under color of territorial law, of rights guaranteed by the laws of the United States and the Constitution.

The appellants alleged four different grounds upon which the appellees, acting under color of territorial law, had deprived, injured, oppressed and intimidated them in the free exercise of rights guaranteed by the laws and Constitution of the United States. They alleged, that unless restrained, appellees would continue in their unlawful conduct. Appellants further alleged that they had no plain, adequate and speedy remedy at law and asked the Court to enjoin the continued deprivation of their rights by appellees. (R. 5.)

Factually, the background of the case is as follows:

In September, 1946, there was a strike in progress against the Lihue Plantation Company, Limited, a sugar plantation on the Island of Kauai in the Territory of Hawaii, called by the recognized exclusive bargaining representative of its employees, Unit 1, Local 149 of the International Longshoremen's and Warehousemen's Union, CIO. After the strike had been in progress seventeen days, on September 17, the Lihue Plantation Company applied to the appellee judge for an ex parte restraining order. The appellee judge issued a restraining order in the form requested by the company. The order restrained the International Longshoremen's and Warehousemen's Union, CIO, a trade union consisting of thousands of members employed in the Territory of Hawaii, in the continental United States, Puerto Rico and Canada;

Local 149 of said Union, which includes the employees of almost all the sugar plantations on the Island of Kauai; Unit 1 of Local 149, which includes the employees of Lihue Plantation Company; the individual officers of Unit 1 of Local 149; and unnumbered John and Mary Does and Roes.

Thereafter, the defendants in the equity action moved to dissolve the ex parte restraining order on the grounds that the Court was without jurisdiction to issue it without complying with the provisions of the Norris-LaGuardia Act and that the order issued violated the constitutional rights of the persons restrained. The appellee judge denied the motion, but subsequently on his own motion amended the restraining order by deleting therefrom restraints not requested by the petition of the Lihue Plantation Company.

Insofar as here relevant, the ex parte restraining order, as amended, prohibited the defendants in the equity action

. . . until further order of this Court from *in any way* . . .

(7) Mass picketing by assembling in compact groups or congregating in crowds on or near real property of the petitioner, whether used for business or residence purposes, to thereby prevent or attempt to prevent or in any manner physically obstruct or interfere with ingress to or egress from said real property by petitioner, any of its employees, or any other persons lawfully seeking to enter or leave any of said real property;



And in Furtherance Hereof, you are hereby ordered to limit the number of pickets which you shall use to not more than three (3) pickets in a group at any point and station when stationed at points of ingress to and egress from the petitioner's property, provided, however, that any pickets in excess of three (3) at any one point and station, shall be in motion, and, except when passing each other, shall maintain a distance of not less than ten (10) feet between each other . . . and all pickets being also enjoined from *otherwise committing* any of the acts hereinabove prohibited. (R. 41, 45-46.)

The appellants were indicted for unlawfully, feloniously and willfully violating these specific provisions of the ex parte amended order. (R. 32-40.) None of the appellants were defendants in the equity suit and most of them are not employed by the Lihue Plantation Company nor members of the unit representing its employees. No fraud or violence is charged in the indictment—merely that appellants mass picketed and congregated in crowds in groups of more than three, not being in motion.

Geographically, the scope of the ex parte amended order encompasses “on or near the real property of the petitioner, whether used for business or residence purposes.” This includes 12,472 acres, 20 company towns or camps in which the employees and their families live, miles of privately owned, but publicly used roads and some public highways and streets.

At the time appellants' complaint was filed there was pending before this Court an appeal from a de-

nial by the Supreme Court of the Territory of a writ of prohibition against another Circuit Court judge who had likewise issued an ex parte injunction limiting picketing to three persons without complying with the provisions of the Norris-LaGuardia Act. The appellee attorney general, who was counsel for the defendant judge in the case, had agreed that the decision in that case (*ILWU v. Wirtz*, No. 11,568), would control, and that it would not be necessary to file in the Supreme Court a similar proceeding against the appellee judge here. However, after the decision of the Supreme Court of the Territory of Hawaii, the appellees here refused to stay the trial of appellants until determination of the issue on appeal in the *Wirtz* case—despite the fact that it is customary in criminal cases not growing out of labor disputes to grant stays under similar circumstances.

The four grounds on which appellants alleged in their complaint that appellees, under color of territorial law, were depriving them of rights guaranteed by the Constitution and laws of the United States, and injuring, oppressing and intimidating them in the exercise of these rights were:

1. The appellee judge was without jurisdiction to issue the ex parte amended restraining order without complying with the provisions of the Norris-LaGuardia Act, and the order was wholly void and deprived appellees of rights guaranteed by that act; that appellees have been indicted for violating a void order of Court, and for conduct which cannot be restrained, and are being forced to defend themselves against

such an indictment before the appellee judge who has already denied that appellees have such rights and whose hands are now tied by the ruling of the territorial Supreme Court, making any attempt on appellees' part to assert their rights in territorial Courts futile; that they will be forced to continue to suffer deprivation of rights unless appellees are restrained.

2. In the alternative, if the Norris-LaGuardia Act does not apply to territorial Circuit Courts, then the appellee judge has no jurisdiction whatsoever to issue the order complained of, because Congress has conferred exclusive jurisdiction to issue injunctions in labor disputes upon the Federal District Court, and then only in strict conformity with the Clayton and Norris-LaGuardia Acts and to restrain acts of fraud and violence, and the same deprivation of appellants' rights as outlined above have occurred and threaten to continue.

3. The Clayton and Norris-LaGuardia Acts confer on appellants, as on all members of unions in the Territory, substantive federal rights which no territorial Court can restrain in the absence of fraud or violence. The provisions of the order complained of are void because they prohibit the free exercise of rights granted to appellants by these laws, and appellants are being charged criminally for doing what Congress gave them a right to do.

4. The order of the appellee judge complained of, and the indictment based upon it, deprive appellants of, rights of free speech and assembly guaranteed to them by the Constitution.



The underlying theory on which the first three grounds of appellants' complaint are based are fully briefed in *ILWU v. Wirtz*, No. 11,568, in the records of this Court, which is set for argument before this Court on July 22, 1948. Inasmuch as these grounds are already fully briefed in the case pending before the Court, counsel requests the indulgence of the Court in incorporating that brief by reference in the instant proceeding since all the discussion and authorities there cited are relevant here.

Upon application and showing made pursuant to Rule 65 of the Federal Rules of Civil Procedure, a temporary restraining order was issued *ex parte* against the appellee attorney general, and an order to show cause why an injunction *pendente lite* should not be granted was issued against both appellees. (R. 51.) As argument on the return to the order to show cause was not concluded within the ten day period fixed by the rules, the restraining order was extended under the rule an additional ten days.

The appellees' return to the order to show cause, entitled "Defendants' Objection to the Allowance of Preliminary Injunction" (R. 53), raised the following defenses in law:

1. That the District Court has no jurisdiction to enjoin the judge of a circuit court of the Territory.
2. The appellee judge is not a proper party to the suit.
3. A federal District Court has no jurisdiction to enjoin criminal prosecutions in territorial courts.

4. The complaint fails to state a claim for equitable relief on any ground.

After hearing, the Court overruled all of the appellees' objections to the issuance of a temporary injunction.

In its ruling upon the motion for a preliminary injunction (R. 54), the Court said:

"The question—and the only question now before the court—is whether or not, *pending a hearing upon the merits*, a Temporary Injunction should issue."

After ruling against appellants on the first two causes of action stated in the complaint, the Court said:

However, in this case, and with reference to the facts alleged and the law involved in the plaintiffs' third and fourth causes of action, a preliminary injunction should and therefore will issue.

\* \* \* \* \*

In brief, with no questions of Territorial law involved at all, it looks as if Plaintiffs are in jeopardy because they did things which federal law allowed.

A preliminary injunction to remain in effect pending hearing on the merits was issued on February 21, 1947. (R. 66.)

At the request of appellees, and with the approval of the Court, appellees' time to answer was extended from time to time. On July 21, 1947, appellees filed their answer (R. 69), admitting, denying and controverting the various allegations of the complaint, and reiterating under the heading "Defenses in Law"

the same objections raised in their objections to the allowances of a preliminary injunction. Attached to appellees' answer as Exhibit "A" was a certified copy of the record and files of the Circuit Court in the equity action before the appellee judge, and attached as Exhibit "B" was a transcript of the evidence taken at the *ex parte* hearing before the appellee judge.

Simultaneously with the filing of their answer, appellees filed a motion for hearing and determination of the defenses before the trial pursuant to Rule 12(d). (R. 306.) Only one new defense in law was raised—that in the light of the Supreme Court's decision in *U. S. v. United Mine Workers*, 330 U. S. 258 (1947), the Territory has authority to punish for contempt violations of orders void because of lack of jurisdiction or in violation of constitutional rights. The Court found it unnecessary to decide this question.

Before argument on the appellees' motion under Rule 12(d) and within the time allowed by Rule 12(f), appellants filed a motion to strike Exhibits "A" and "B" attached to appellees' answer (R. 309) on the ground of immateriality. This motion was filed at a conference in chambers with the district judge in the presence of counsel for appellees. The district judge stated that appellees' motion under Rule 12(d) would be heard first, and a hearing on appellants' motion to strike would then be had.

On September 4, before the conclusion of argument on appellees' motion for determination of defenses



before trial appellees filed a second motion requesting that the whole record including the exhibits annexed to their answers be considered. The appellees stated that this motion was based upon Rules 12 and 56 of the Rules of Civil Procedure. (R. 312.) The notice specified September 8 as the date for hearing—six days less than the required notice of a motion for summary judgment.

After argument on appellees' motions under Rules 12 and 56 and before hearing appellants' motion to strike the exhibits attached to appellees' answers, the Court took its ruling under advisement and informed counsel they would be notified when the Court was ready to rule.

Without affording appellants an opportunity to be heard on their motion to strike, as is shown by the judgment (R. 343), without affording them an opportunity to file counter-affidavits to the *ex parte* exhibits and testimony relied on by the Court, and without an opportunity to be heard on the merits of the allegation of their complaint which included issues of denial of equal protection of the laws and of criminal proceedings not brought in good faith, the District Court converted appellees' motion to dismiss into a motion for summary judgment. (R. 314.)

A judgment and decree in accordance with the Court's decision dismissing the action, dissolving the preliminary injunction, and granting summary judgment for the appellees was entered on December 22, 1947. (R. 344.)

Notice of appeal to this Court (R. 344) and a petition for restoration of the injunction pending appeal were filed on December 24, 1947. (R. 345.) The District Court indicated that it would restore the injunction pending appeal, provided appellants would stipulate with appellees to waive their rights to be confronted by witnesses against them on testimony perpetuated by the appellees, in event any witness whose testimony was so perpetuated was unable to appear when and if the case was heard before the appellee judge. Such a stipulation having been entered into, the injunction pending appeal was ordered. (R. 351.)

The injunction restored was amended to permit appellees to substitute an information for summary contempt charging the identical offense charged in the indictment. Appellees entered into a stipulation with plaintiffs, pursuant to the provision in the District Court's order, that the information for summary contempt based on the same alleged violations of the amended *ex parte* restraining order should be considered with the same force and effect as if the information had been the subject matter of the complaint and that this appeal should apply to the information the same as if summary contempt proceedings by information had been brought by the Territory in the first instance, instead of the indictment. (R. 355.) The information for summary contempt charging the same offense and based on the same portion of the amended *ex parte* order is set forth on page 357 of the record.

**QUESTIONS PRESENTED.**

1. Did the District Court err in granting summary judgment for appellees and entering the decree dismissing the action and dissolving the preliminary injunction; and in overruling appellants' motion to strike portions of the complaint and the exhibits attached thereto?

2. Did the District Court err in holding that the appellee judge had jurisdiction to issue an *ex parte* restraining order in a case growing out of a labor dispute without complying with the provisions of the Norris-LaGuardia Act.

3. Did the District Court err in holding that Sections 1 and 20 of the Clayton Act and the Norris-LaGuardia Act do not confer exclusive jurisdiction on the Federal District Court of Hawaii to issue injunctions in labor disputes in strict conformity with those acts?

4. Did the District Court err in holding that the Clayton and Norris-LaGuardia Acts operate in the Territory of Hawaii exactly as they do in relation to states, and that these acts do not confer on appellants the right to engage in the concerted labor activity specifically made lawful and unenjoinable by those two acts?

5. Did the District Court err in holding that appellants were not deprived of their constitutional rights of free speech and assembly by the appellees by reason of the issuance of the *ex parte* amended restraining order, and the indictment based thereon, which proscribed peaceful picketing and assembly?



**OPINION OF DISTRICT COURT.**

The decision of the District Court is set forth in full at page 314 of the Record.

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**ARGUMENT.****I.**

**THE DISTRICT COURT ERRED IN MAKING AND ENTERING ITS JUDGMENT AND DECREE DISMISSING ACTION AND DIS-  
SOLVING THE PRELIMINARY INJUNCTION.** (Statement of Point on which appellants intend to rely on appeal, Point (a), Record 378-379.)

The District Court erred in considering at all, and in relying on, Exhibits "A" and "B" of appellees' answer in holding valid the amended *ex parte* restraining order, for violations of which appellants were indicted. Or, if this contention be held unsound, certainly the District Court erred in overruling appellants' motion to strike without hearing or without affording appellants an opportunity to controvert Exhibits "A" and "B" and adduce other proof under Rule 56 after adverse ruling on the motion.

The appellants' complaint alleged that the appellees, acting under color of territorial law, had deprived them and were threatening to continue to deprive them of rights guaranteed by the Constitution and laws of the United States. The issue raised by the complaint is that appellants were being prosecuted under an indictment which charged them with feloniously violating an *ex parte* restraining order enjoining conduct which the laws and the Constitu-

tion of the United States guaranteed them a right to engage in. Appellants, in their first two causes of action, alleged that the Court was wholly without jurisdiction to issue the restraining order by virtue of the Clayton and Norris-LaGuardia Acts.

The issue raised by the complaint is narrow and concise. As stated by the District Court in his ruling on the motion for preliminary injunction (R. 54) it was whether, with no questions of territorial law involved, appellants were in jeopardy because they did things which federal law allowed.

Under the Fifth Amendment to the United States Constitution—which applies in the Territory—appellants cannot be prosecuted for a felony except by indictment. Only the indictment and the provisions of the amended ex parte restraining order alleged to be violated are relevant in determining what the charges against appellees in the territorial Court are. Conviction on a charge not made would be a sheer denial of due process.

The Sixth Amendment requires that appellants be informed of the charge against them; they cannot be convicted on a charge not made, whether misdemeanor or felony. Whether appellees are being deprived of rights guaranteed by federal law and the Constitution must be judged wholly on the indictment and the provisions of the amended restraining order alleged therein to be violated.

In his answer, the appellee judge admitted that he had not complied with the Norris-LaGuardia Act, but

denied that it had any application to territorial Circuit Court judges. Both appellees denied all of appellants' assertions in respect to the deprivation of rights guaranteed by the laws and Constitution of the United States.

Since nothing contained in the records of the equity action before the appellee judge could enlarge or change the indictment against appellants, or affect the determination of whether the asserted deprivation of rights by virtue of the prosecutions for the alleged violations of the amended *ex parte* order existed, appellants promptly moved to strike from the answer the redundant, immaterial and irrelevant portions of the answer referring to Exhibits "A" and "B" and the exhibits themselves.<sup>2</sup> Without ruling on this motion to strike, the Court proceeded to hear argument on appellees' motion under Rule 12(d). The District Court and the appellees assumed that Rule 12(b) as amended in the new Federal Rules of Civil Procedure had become effective, and that the Court could consider the motion under Rule 12(d) and the untimely motion under Rules 12 and 56 as a motion for summary judgment.<sup>3</sup> Even on

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<sup>2</sup>Under amended rules now in force, proper pleading would be a motion to strike for insufficient defense. Prior to the amendment, some courts had treated a motion to strike for irrelevancy as a proper method to test the sufficiency of a defense.

<sup>3</sup>The amended rules of procedure did not become effective until March, 1948, three months after this case was decided. The old rules made no provision for treating a motion under Rule 12(d) as a motion for summary judgment. By the new rules, the following provisions which the District Court mistakenly thought was in effect, was added:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which



this assumption, however, the Court gave appellants no opportunity to present material pertinent under Rule 56 before entering his decision construing appellees' motion as a motion for summary judgment.

Appellants do not believe the rules require them to controvert the matter contained in these exhibits until after disposition of their pending motion to strike this matter from the answer. They also believe that, under Rule 8(d), providing that "averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided," the exhibits, being incorporated as a part of the answer were deemed denied for the purposes of appellees' motions.<sup>4</sup>

But the district Court went even further and held that even if the exhibits were improper pleading,

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relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

<sup>4</sup>See *Bakery Sales Drivers' Local Union No. 33 v. Wagshal*, 92 L. ed. (Adv. Op.) 599, decided March 15, 1948. There the appellant challenged the use of affidavits attached to a complaint for the purpose of determining whether a labor dispute existed. The Court said:

But in this case the affidavits were merely a gloss on the complaint and as such constituted an informal amendment. They serve here as allegations, not proof. This case was decided on a motion to dismiss. All that was determined was that on the basis of respondent's claims, which the petitioners chose not to controvert, the Norris-LaGuardia Act did not apply.

Here the affidavits being attached to the answer, it was not necessary to controvert them. Appellants submit that at most, the exhibits constituted allegations and not proof as they were used by the Court.

appellees' motion to consider them in connection with Rule 12 filed during the hearing constituted a speaking motion authorizing the Court to consider them and to construe the motions together as motions for summary judgment, even though appellees' second motion was untimely and appellants' intervening motion had not been heard or disposed of. (R. 314, 320.) At the least, appellants were entitled to an opportunity to controvert the ex parte record.

Appellants were, for example, entitled to show, by affidavit or proof, only three of the appellants were employees of the Lihue Plantation Company and that the ex parte affidavits and testimony contained no allegations or proof of any kind that the remaining appellants had engaged in any conduct of any kind or in any fraud or violence, or in any mass picketing in the strike at Lihue; that there was no basis of allegation or fact contained in the whole record that these appellants had engaged in any conduct whatsoever in connection with the strike of the employees of the Lihue Plantation Company warranting restraint of their federal and constitutional rights to engage in peaceful picketing.

Appellants were entitled to support, by affidavit or proof, their charges of denial of equal protection of the laws.

Appellants were entitled to show that because of the size and scope of the area covered by the restraining order, its application to the towns or camps in which they lived, and the narrowness of the limi-

tation, that their right to picket was drained of all substance and effectiveness, and that appellees were aware of these factors.

Appellants were entitled to show that the appellee judge was disqualified in law under 48 U.S.C.A. 636 to issue any restraining order by virtue of the fact that the relatives of the appellee judge within the third degree of consanguinity and affinity were large stockholders in the Lihue Plantation Company, and that the appellee judge himself was formerly counsel for the Company.

These and other proofs in support of the allegations in their complaint, appellants were entitled to an opportunity to present.

Appellants submit that the District Court committed prejudicial error in relying upon these exhibits, in transforming appellees' motion under Rule 12(d) into a motion for summary judgment, and in overruling appellants' motion to strike without argument and without affording them an opportunity to controvert the exhibits on which the Court relied in reaching his decision.

The Supreme Court of the United States has warned against deciding grave constitutional issues on a motion to dismiss or its equivalent. Thus Mr. Justice Cardozo in his concurring opinion in *Borden's Farm Products Company v. Baldwin*, 293 U.S. 194, 213 said:

We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon



an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the question clearer.

See also

*Dioguardi v. Durning*, 139 F. (2d) 744 (1944);  
*Burt v. City of New York*, 156 F. (2d) 791  
 (1946), and  
*Picking v. Pennsylvania*, 151 F. (2d) 240  
 (1945).

The record reveals that appellees were afforded two opportunities to present exactly the same defenses in law—first on their objection to the allowance of the injunction *pendente lite*, and second in their motion to determine their legal defenses before trial. On its first ruling the District Court overruled all the defenses presented. On its second ruling, the District Court reconsidered and reversed its ruling that appellants had stated a claim for equitable relief.

The Court's ruling is somewhat confused as to whether this reversal is based on the proposition that reference to the record before the appellee judge shows as a matter of *fact* that there was no deprivation of federal substantive rights nor of rights guaranteed by the First Amendment or whether reference to this record shows as a matter of *law* that there was no deprivation of appellants' federal and constitutional rights.

Is there, the Court asks, any reason to alter the initial ruling that the plaintiffs have stated a claim for equitable relief? (R. 332.) The Court continues:

I am inclined to believe that there is. It does not now appear to me that the plaintiffs' constitutional rights have been invaded by Judge Rice's restraining order. (R. 332.)

And again, after discussing the record in the *ex parte* proceedings contained in the disputed exhibits:

... I find in *point of law* that plaintiffs' constitutional rights have not been invaded by the Amended Restraining Order.

There being no genuine *issues of fact* remaining to be tried, summary judgment for the defendants may be entered. (R. 339.)

It certainly cannot be said as a matter of law that any judge bound by the Constitution of the United States can decree that out of hundreds of farm workers on strike only three can exercise their right to peacefully picket and assemble simultaneously on country roads at points of ingress and egress. Nor can it be said as a matter of law that a judge can make the exercise of the right by such strikers to assemble in groups of more than three conditional on their remaining ten peripatetic feet apart.

The only justification that has been advanced for enjoining peaceful picketing since the outmoding of the lone missionary permitted in the *Tri-City* case is a background of violence flagrant and long continued. It certainly would not be argued that on an assertion by an employer of violence in picketing and of irreparable injury an equity judge could issue an order against the general public directing that there be no assembling near this employer's property.

Whether restraints on peaceful picketing are justified—if they can be justified at all—must depend on facts, not law.

Where, as here, peaceful assembly has been enjoined and the engaging in peaceful assembly charged as a crime, appellants are surely entitled to some opportunity to show the facts on which they base their allegations of deprivation of rights guaranteed by federal law and of injury, intimidation and oppression in the exercise of those rights.

Appellees were afforded two opportunities for hearing on exactly the same defenses, and appellants were denied even an opportunity to controvert facts which the Court held in point of law entitled appellees to summary judgment.

It seems unlikely that it was ever the intention of the federal rules to apply the pre-trial determination of legal defenses in an injunction suit, for the very purpose of injunction *pendente lite* is to maintain the status quo pending *hearing on the merits*. The legal defenses are heard before its issuance or refusal.

But even assuming the propriety of the District Court's consideration of, and reliance on, the record contained in appellee's Exhibits "A" and "B" without affording appellants an opportunity to be heard on their motion to strike, the District Court erred in holding that the record contained in these exhibits justified the restraints imposed by the appellee judge on peaceful picketing. An examination of this record shows that the request of the Lihue Plantation Company for an *ex parte* order against picketing was



made on a spurious claim of great emergency as a part of employer strike strategy. It is obvious that the defendants in the equity action before the appellee judge could have been afforded notice and an opportunity to be heard within the same space of time as it took to prepare secretly the great mass of affidavits and to take the *ex parte* testimony, set forth in these exhibits.

Even a cursory examination of the voluminous record calls to mind Justice Frankfurter's questioning of the wisdom of *ex parte* orders which are frequently asked by employers on spurious claims of great emergency and irreparable injury as a part of the employer's strategy in breaking the strike and disrupting morale of the strikers. In his book, *The Labor Injunction*, he says at pages 223-224:

An examination of the detailed history of federal cases discloses that perhaps the most serious abuse in the present state of the law is due to the elastic clause of the Clayton Act which permits such *ex parte* orders to remain effective for ten days and to be extended by the court "for good cause shown." As a result, the restraining order has frequently been kept alive for weeks and months. There is only one possible justification for qualifying the basic principle of giving parties an opportunity to be heard before action against them; the needs of an emergency may outweigh the risks of one-sidedness and consequent hardship. When, however, applicants for such orders spend many days in framing affidavits by the score and perfecting their complaints, and, on occasions, as did the United States Government in the Railway Shopmen's Strike, allow themselves time to

put the whole mass of documents through the press under cover of utmost secrecy lest anyone discover that an application to a court is contemplated—the inference must follow that emergency claimed is emergency feigned. Surprise is obviously the tactical advantage sought through such an order.

Is it wise for courts of equity, particularly federal courts, under these circumstances to countenance dispensation of the prime requisites of due process,—notice and opportunity to be heard? This question, indeed, raises a serious doubt as to the adequacy of the five-day limitation as a corrective. Certainly the time limit as phrased should be strengthened, at least by an express provision that the order be not renewable. The really adequate solution would be abolition of *ex parte* restraining orders in these cases, based upon a realization that the *ex parte* order possesses potentialities of great evil and is too rarely of sufficient immediate necessity to outweigh the dangers of its abuse. Such, it may be recalled, was the recommendation made in earlier years by the present Chief Justice and would be a return to the historic rule in the federal courts. Wisconsin conforms its law to experience by denying restraining orders in labor disputes except upon forty-eight hours' notice.

Appellants respectfully submit that the judgment and decree of the District Court should be reversed, and appellants afforded an opportunity to be heard on the merits.

## II.

THE DISTRICT COURT ERRED IN HOLDING THAT THE APPELLEE JUDGE HAD JURISDICTION TO ISSUE THE EX PARTE RESTRAINING ORDER ON WHICH THE INDICTMENT IS BASED WITHOUT COMPLYING WITH THE PROVISIONS OF THE NORRIS-LA GUARDIA ACT, AND IN HOLDING THAT THE ORDER IS VALID AND DOES NOT DEPRIVE APPELLANT OF FEDERAL RIGHTS. (Statement of Points on which appellants intend to rely on appeal, Points (h), (l), (n), (o), (q), Record 378, 379-381.)

The District Court both in its ruling on the preliminary injunction (R. 54) and in its decision upon appellees' motion for determination of defenses in advance of the trial (R. 314) held that the Norris-LaGuardia Act does not limit the jurisdiction of Circuit Courts of the Territory. The Court cited with approval the decision of the Supreme Court of the Territory in *ILWU v. Wirtz* now pending on appeal before this Court which involves this issue. The Court differed with the conclusion reached in that case that the Norris-LaGuardia Act applies only to constitutional Courts of the United States, and held specifically that it applies to the Federal District Court for Hawaii which is a legislative Court of the United States.

Since the question of the application of the Norris-LaGuardia Act to Territorial Circuit Courts is fully briefed in the *Wirtz Case*, No. 11,568, reference is hereby made to appellants' opening and reply briefs in the *Wirtz case*, and it is requested that the arguments contained therein be considered in this case as fully as if set forth at this point in this brief.



Briefly, it is appellants' contention that territorial Courts, including the Circuit Courts of the Territory of Hawaii on which the appellee judge serves, are subject to the provisions of the Norris-LaGuardia Act because they are Courts whose jurisdiction is conferred, defined and limited by Act of Congress.

Section 13 (d) of the Norris-LaGuardia Act defines the words "Courts of the United States" as used in the act as "any Court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the Courts of the District of Columbia."

Territorial Courts were created by Congress and their jurisdiction was conferred, defined and limited by Congress, and they are at all times subject to its plenary control. Territorial Courts thus fall squarely within the definition contained in the act, and the act, therefore, clearly limits their jurisdiction. Nor is the clear-cut legislative definition of Courts contained in the Norris-LaGuardia Act the only factor that compels this conclusion. The Norris-LaGuardia Act amends the Sherman and Clayton Acts.<sup>5</sup>

It must therefore be given the same scope and coverage as the Sherman and Clayton Acts which it amends.

The Sherman Act and Clayton Act specifically apply to the Territory of Hawaii. Thus under Section 1 of the Clayton Act commerce is defined as commerce between or in and within the territories of the United

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<sup>5</sup>*U. S. v. Hutcheson*, 312 U.S. 219.

States. Under both these acts the Supreme Court has held that Congress exercised its full and plenary power. *United States v. Frankfort Distilleries*, 65 S. Ct. 661; *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 495; in *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, the Supreme Court held that the power exercised by Congress in the enactment of the provision of Section 3 of the Sherman Act within the District of Columbia, was its plenary power to legislate for the district.

The language used in respect to the district and territories in both the Sherman and Clayton Acts is identical. It, therefore, is clear that both these acts apply fully to the territory and constitute an exercise by Congress of its conceded plenary power to legislate for the territory.

If the Norris-LaGuardia Act, as an amendatory act, is not given the same scope and geographical effect, the absurd result follows that unamended Clayton and Sherman Acts are in effect in the territory.

The Norris-LaGuardia Act, like the Sherman and Clayton Acts, is an exercise by Congress of its plenary power to legislate for the territory.

As interpreted by the Supreme Court in the *United States v. Hutcheson*, 312 U. S. 219, the Clayton and Norris-LaGuardia Acts

1. exempt labor organizations engaged in labor disputes from the anti-trust acts,
2. drastically limit the power of Courts to issue injunctions in labor disputes,

3. specifically make lawful all the labor union activity defined in Section 4 of the Norris-LaGuardia Act.

Since the power of the territorial legislature is limited to laws not inconsistent with the laws of the United States locally applicable, the legislature could not confer, and a Circuit Court does not have power to enjoin acts specifically made lawful under *all* laws of the United States.

Section 1 of the Norris-LaGuardia Act (29 U.S.C.A. 101, *Appendix infra*) provides that no Court as therein defined has *jurisdiction* to issue injunctions in a case involving or growing out of a labor dispute, except in strict conformity with the act.

If, as appellants contend, the Norris-LaGuardia Act limits the jurisdiction of Circuit Courts, the amended temporary restraining order issued by the appellee judge is void, and the appellants have been deprived of rights guaranteed by that act by the appellees.

If the act applies, the appellee judge had no power under the act to restrain the conduct for which appellants have been charged criminally under the *ex parte* order.

The Norris-LaGuardia Act was passed in 1933. Its application to District Courts of the territory had been unchallenged from 1938, when Le Baron, first judge of the Circuit Court of the First Judicial Circuit, ruled that it was applicable to territorial Circuit Courts. The order issued by the appellee judge was the first *ex parte* injunction in a labor dispute in the



territory since the 1938 ruling. The ruling of the Territorial Supreme Court in the *Wirtz* case has made ex parte injunctions an employer vogue. Injunctions blanketing a whole island have been issued.

It is respectfully submitted that the District Court erred in holding that the Norris-LaGuardia Act does not apply to territorial circuit courts, and that appellants have not been deprived of rights guaranteed by the Clayton and Norris-LaGuardia Acts by the appellees under color of territorial law. Appellants submit that the first cause of action stated in their complaint was erroneously dismissed.

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### III.

**THE DISTRICT COURT ERRED IN HOLDING THAT SECTIONS 1 AND 20 OF THE CLAYTON ACT AND THE NORRIS-LA GUARDIA ACT DO NOT CONFER EXCLUSIVE JURISDICTION ON FEDERAL DISTRICT COURTS OF THE TERRITORY TO ISSUE INJUNCTIONS IN LABOR DISPUTES.** (Statement of Points on which appellants intend to rely on appeal. Point (i).)

This theory, which is in the alternative to the first cause of action stated in appellants' complaint, is argued in appellants' briefs in *ILWU v. Wirtz*, which has already been referred to with the request that they be considered in this case.

In summary appellants contend that if the intent of Congress is to be effected, there is only one alternative construction to holding the Norris-LaGuardia Act applicable to a Circuit Court of the Territory. That is to construe the act as manifesting an inten-

tion to confer exclusive jurisdiction, subject to limitations contained in the act, on the Federal District Court for the Territory of Hawaii to issue injunctions in cases involving or growing out of labor disputes.

This construction would fully effect the purposes of the act and would not be inconsistent with its provisions. Under this theory, as in the first cause of action, the appellee judge was without jurisdiction to issue the amended order, and his order is wholly void.

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#### IV.

**THE DISTRICT COURT ERRED IN HOLDING THAT THE CLAYTON AND NORRIS-LA GUARDIA ACTS OPERATE IN THE TERRITORY OF HAWAII EXACTLY AS THEY DO IN RELATION TO STATES, AND IN DENYING THAT THESE ACTS CONFER ON APPELLANTS THE RIGHT TO ENGAGE IN THE CONCERTED LABOR ACTIVITY MADE LAWFUL AND UNENJOINABLE BY THESE TWO ACTS.** (Statement of Points on which appellants intend to rely on appeal, Points (j), (p) and (q).)

The District Court, in its ruling on appellants' motion for a preliminary injunction held that the Clayton and Norris-LaGuardia Acts jointly construed, as the Supreme Court in the *Hutcheson*<sup>6</sup> case said they must be, create federal substantive rights.

The preliminary injunction should issue, the Court said, because in the absence of any territorial law, and in the light of the definite federal laws relat-

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<sup>6</sup>310 U.S. 88.

ing to permissible labor conduct—which laws the territorial Courts, too, must respect—there seems here to be a substantial question as to whether or not that which under federal law may be allowable conduct can—by restrictions placed thereon by a Court, however reasonable they might be—become, as the Supreme Court says, “the road to prison.” (See *U. S. v. Hutcheson*, 312 U. S. 219; *Thornhill v. Alabama*, 310 U. S. 88; *Hague v. CIO*, 307 U. S. 507.)

The Court reversed itself in its final decision holding that the “allowable conduct” under the Clayton and Norris-LaGuardia Acts is binding upon the territory insofar as it coincides with the First Amendment, but beyond that is no more binding on the territory than it is on a state.

To reach this conclusion the Court accepted the construction argued by Livingston Jenks, counsel for the Hawaii Employers Council, *amicus curiae*. Mr. Jenks argued that the provision in Section 20 of the Clayton Act that none of the specified acts “shall be held to be violations of any law of the United States” means “violations of the Sherman Act or any other federal law which might have a bearing on the Sherman Act.” (R. 22.)

Appellants cannot square this construction with the Supreme Court’s ruling in the *Hutcheson* case that:

The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later act. In this light, Section 20 removes all such allowable conduct from the taint



of being a "violation of any law of the United States," including the Sherman Law.

All the power exercised by the territory comes from Congress—whether exercised by the territorial judiciary or by the legislature—and the power delegated by Congress is only power "consistent with the laws and Constitution of the United States."<sup>7</sup> The proposition, therefore, that federal substantive rights have no more effect on territorial Courts than on state Courts cannot stand.

The Norris-LaGuardia Act and the substantive rights thereunder do not affect state Courts. They affect only federal Courts in the several states. The Constitution gives to Congress plenary power over the territory. Congress has no such power over the states. The Sherman and Clayton Acts demonstrate well the territory's different status from a state. While these laws do not affect commerce that is intrastate, Congress has regulated every phase of commerce in and within the territory.

Nor are the Clayton and Norris-LaGuardia Acts the first time that Congress has exercised its plenary power to legislate for the territory, particularly in the field of labor. The National Labor Relations Act applied to commerce within the territory as well as to commerce between the territory and the states. The old National Industrial Recovery Act regulated labor relations within the territory to the full extent of Congress' plenary power.

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<sup>7</sup>Organic Act, 48 U.S.C.A. 495, 496, 519, 562, 635.

The territorial legislature has fully recognized the exercise by Congress of its plenary power to legislate in the field of labor relations. Thus in the Hawaii Employment Relations Act of 1945, the legislature both recognized the exercise by Congress of its plenary power to legislate for the territory in the National Labor Relations Act and the National Railway Labor Act and limited the scope of that act to persons not "subject to the National Labor Relations Act and the Railway Labor Act."<sup>8</sup>

The Norris-LaGuardia Act, which is an amendment to the Clayton and Sherman Acts finds its constitutional basis in the power to create federal Courts and to define and limit the jurisdiction of Courts created by it, a power which Congress likewise possesses over territorial but not state Courts.

It is appellants' contention that the substantive rights created by that act affect all persons in the Territory in a manner in which Congress would not have power to legislate for the States. This intention of Congress to exercise the full power it has, while recognizing it could not affect state Courts and state law, is clear from the congressional debates. Mr. LaGuardia, co-author and house sponsor of the bill, after explaining that the bill prevented federal Courts from being used as an agency for strike breaking and as an employment agent for scabs to break lawful strikes, continued:

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<sup>8</sup>The territorial law operates only within the scope of exemptions contained in the federal law. See Session Laws of Hawaii, 1945, Act 250, Sec. 3.

The bill does not take one iota of jurisdiction—*because we have not the power*—from the State Courts and does not change any State law. (Cong. Rec. Vol. 75, Part 5.)

No one reading the legislative history of the Act can doubt that Congress intended to strike down the improvident granting of labor injunctions wherever it had to the power to do so. Appellants believe that the Norris-LaGuardia and Clayton Acts create substantive rights which accrue to all persons in the Territory. Their belief is based directly upon the explicit language of the *Hutcheson* case which says the Norris-LaGuardia Act, read as it must be with Section 20 of the Clayton Act, prescribed the allowable area of labor conduct, and that Congress in the Norris-LaGuardia Act specifically made lawful all conduct enumerated in Section 4 of that Act. (29 U.S.C. 104.) One of those rights made lawful was the right to engage in concert with others in "patrolling" and disseminating information in labor controversies.

Even before the *Hutcheson* case the Supreme Court in *New Negro Alliance v. Sanitary Grocery Company*, 303 U. S. 552 said:

The legislative history of the act demonstrates that it was the purpose of the Congress further to extend the prohibitions of the Clayton Act respecting the exercise of jurisdiction by federal courts and to obviate the results of the judicial construction of that act. It was intended that the peaceful and orderly dissemination of information by those defined as persons interested in



a labor dispute concerning "terms and conditions of employment" in an industry or a plant or a place of business *should be lawful*; that, short of fraud, breach of the peace, violence, or conduct otherwise unlawful, those having a direct or indirect interest in such terms and conditions of employment should be at liberty to advertise and disseminate facts and information with respect to terms and conditions of employment, and peacefully to persuade others to concur in their views respecting an employer's practices.

See also *Wilson v. Birl*, 27 F. Supp. 915, 105 F. (2d) 948, where substantive rights were recognized. See 2 Teller, *Labor Disputes*, p. 1298. *Houston and N. T. Motor Freight Lines v. Local Union, etc.*, 24 F. Supp. 619. Certainly the restraining of the international union and the local union who were not shown in any way to have participated in the acts complained of by *ex parte* order was a violation of Section 6 of the Act.<sup>9</sup>

Here, almost all the plaintiffs are not employees of Lihue Plantation Company and were, therefore, clearly not participants in any alleged acts upon which the respondent judge based the *ex parte* temporary restraining order.

It is appellants' contention that the interpretation placed on federal substantive rights created by the Norris-LaGuardia Act by federal Courts should be applied in the Territory.

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<sup>9</sup>See *United States Brotherhood of Carpenters and Joiners v. U. S.*, 67 S. Ct. 775, where this section was held to be a substantive right on which defendants in a criminal trial were entitled to an instruction.

When rules laid down by federal Courts in respect to substantive rights created by the Norris-LaGuardia Act are applied as appellants contend they should be, it is clear that the appellee circuit court judge did not have power to issue the *ex parte* order complained of without infringing on these substantive federal rights. Federal Courts have specifically stated that peaceful mass picketing is not fraud or violence within the meaning of the Act. They have recognized that the conduct made unrestrainable is lawful and was intended to be made legitimate measures of offense and defense in labor disputes.

Thus in *Wilson v. Birl*, 27 F. Supp. 915, the District Court in refusing an injunction in a case growing out of a labor dispute said:

The Norris-LaGuardia Act was intended to limit drastically the power of the Federal Courts to issue injunctions in labor disputes. In fact, it might be said in a general way that the purpose was to put an end to it, *except for a residue of jurisdiction necessary for the protection of property against destruction by violence or fraud.*

To accomplish the purpose of the act, Congress enumerated in Sec. 4 various types of conduct as to which jurisdiction to enjoin was taken away. *The list covered a wide field of labor conflict activities and implicitly recognized the conduct in question as legitimate measures of offense and defense in labor disputes.*

In this enumeration the Act is wholly objective. It is not concerned with the purpose for which the acts are done or with the state of mind of the participants or with any question of intent

expressed or presumed. The law makes no distinction between doing the acts in question with a legal object in view and doing them with an illegal object. See *Levering & Garrigues Co. v. Morrin*, 2 Circ., 71 F. 2d 284. In short, it was an adoption of the philosophy of Justice Brandeis' dissenting opinion in *Duplex Printing Press Company v. Deering*, 254 U. S. 443, 41 S. Ct. 172, 183; 65 L Ed. 349, 16 ALR 165 which condemned the point of view which made conduct actionable "when done for a purpose which a judge considered socially or economically harmful and therefore branded as malicious and unlawful."

The Circuit Court of Appeals in affirming the decision of the District Court approved the language of the District Court, saying:

The picketing here complained of averaged 10 to 15 persons at a time; and on one occasion rose to 97. The subsections dealing with picketing found in (e) and (f) are as follows:

- (e) Giving publicity to the existence of, or the facts involved in any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
- (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute.

Again, the uncertain test, expressed in the word "lawful" (picketing) is not employed. If the picketing is peaceful, unaccompanied by acts of violence, irrespective of whether it may be mass picketing, and therefore *according to appellant's*



*argument* illegal in Pennsylvania, it cannot be enjoined by a federal court. Strikes and picketing are general acts, involving concerted efforts; the narrow limit of federal restraining power, under this act, is confined to forbidding defined acts of individuals.

The purpose of the Act, to quote the trial judge, was "to take the Federal courts out of the business of granting injunctions in labor disputes, except where violence or fraud are present."

*Carter v. Herrin Motor Freight Lines*, 131 F.2d 577, 560, clearly recognized that the enumerated acts not only are unenjoinable but are expressly recognized to be legitimate labor activity:

The language of the Act is too plain and the decisions construing it too clear cut and positive to admit of any doubt that the purpose and effect of the Act as a whole, was to give expression to, and make effective the policy which breathes throughout it. The policy is that labor disputes, as such, with the assembling, the picketing, the persuasion, the stopping of work, the enlisting of sympathy and support, and all the other acts expressly enumerated in Section 104, were no longer to be the subject of injunction action but were, and were expressly recognized to be, legitimate means of advancing the interests of the working man, and, therefore, of the people as a whole. . . .

It has been pointed out in numerous decisions, and as long as the statute stands unrepealed and unamended, it cannot be too often repeated by the courts, that the act was passed because, whether rightly or wrongly Congress, or at least a majority in Congress, was of the opinion, that the atti-

tude of employers in general toward labor disputes was not only wrong, but intransigent and recalcitrant, that federal injunctions were commonly resorted to in such disputes for the purpose of obtaining backing in this attitude, and that the use of such injunctions in labor disputes except for the limited purpose of preventing injury from violence where there was really no adequate remedy at law was an abuse of legal process.

The right to engage singly or in concert in picketing and assembling to further the interest of persons engaged in a labor dispute surely cannot be limited to three pickets under rigidly prescribed conditions on an *ex parte* request of an employer by a territorial circuit court judge without destroying these federal substantive rights.

See appellant's opening and reply briefs in *ILWU v. Wirtz*, already referred to, and especially the report of the Senate Committee, *Report on the Norris-LaGuardia Act*, set forth in the appendix of the Reply Brief.

Appellants respectfully submit that the District Court erred in holding that the Norris-LaGuardia Act does not make lawful and unenjoinable the rights enumerated in Section 4 of the Norris-LaGuardia Act.

## V.

THE DISTRICT COURT ERRED IN HOLDING THAT APPELLANTS WERE NOT DEPRIVED OF THEIR CONSTITUTIONAL RIGHTS OF FREE SPEECH AND ASSEMBLY BY APPELLEES UNDER COLOR OF LAW BY REASON OF THE ISSUANCE OF THE AMENDED EX PARTE RESTRAINING ORDER AND THE PROSECUTION OF APPELLANTS UNDER THE INDICTMENT FOR ENGAGING IN PEACEFUL PICKETING AND ASSEMBLY. (Statement of points on which appellants intend to rely on appeal, Point (k).)

At the outset of this discussion it is necessary to differentiate between appellants' contention that they have by the conduct of appellees been deprived under color of territorial law of federal substantive rights created by the Norris-LaGuardia Act and appellees' claim that they have also been deprived of rights guaranteed by the Constitution.

The purpose of the Norris-LaGuardia Act was to encourage the use of non judicial processes in the area of economic conflict. The evils and abuses of the labor injunction, the questionable traditional equity jurisdiction in labor disputes—a jurisdiction which American Equity Courts, unlike English Courts discovered they possessed only at the end of the last and the beginning of this century—brought about the formulation of the public policy of the United States. See Frankfurter and Greene, *The Labor Injunction*, pages 20-21.

Certainly the evils found by the Congress and the declared usurpation of the spurious equity power by Courts in the field of labor injunctions is just as persuasive in the territory as elsewhere. Since the power of the territorial Courts and the legislature is limited



to acts consistent with federal laws and the Constitution, these courts are bound by the public policy formulated by the act.

In holding constitutional the Norris-LaGuardia Act, the Supreme Court merely said:

There can be no question of the power of Congress thus to define and limit the jurisdiction of inferior courts of the U. S. *Lauf v. Shiner*, 303 U. S. 323.

Appellants contend that the scope of the substantive rights given by the Norris-LaGuardia Act overlap constitutional guarantees but that the two are not coextensive in every respect; that the Norris-LaGuardia Act embraces a wider scope since only acts of fraud or violence are enjoinable and then only after the employer has in good faith made an attempt to settle the dispute.

Now as to the constitutional issue: the sole question here involved is whether a Circuit Court of the territory can prohibit peaceful picketing and can circumscribe the rights of free speech and assembly guaranteed by the first amendment as narrowly as the appellee judge has done in his amended *ex parte* temporary restraining order without hearing and without finding in accordance with the principles of due process of great and imminent danger to the state and the public.

What in fact does his order encompass? He has provided that 100,000 members of the ILWU shall not "in any manner . . . mass picket or assemble in crowds

...'' on or near the real property of the petitioner—which includes public highways—whether used for business or residence purposes—12,472 acres comprising 20 company towns—or to interfere with ingress to or egress from said real property.

Mass picketing or congregating in crowds is defined as groups in excess of three at any point of ingress and egress and at other points groups larger than three must be in motion. Even this limited activity must not otherwise violate any of the provision of the order.

All powers exercised by the territory either through its legislature or its Courts are exercised by virtue of delegation from Congress. The power of Congress is limited by the Bill of Rights. The first amendment unequivocally provides:

Congress shall make no law . . . abridging freedom of speech . . . or the right of people peaceably to assemble.

In the case of the Territory which derives its power from Congress these fundamental liberties are not transmitted through the privileges and immunities clause of the 14th Amendment for they are a restriction on the power of Congress itself.

Appellants are not here contending that the Territory has no power to regulate labor unions and their activity. It may even be asumed that a Circuit Court of the Territory can, consistent with the Constitution, regulate mass picketing. What appellants question is the power of a Circuit Court to so narrowly

define mass picketing without regard to the nature, size and scope of the industrial conflict as to sweep within its ambit both lawful and unlawful conduct in vague, indeterminate language, the construction of which can only be determined in attempted prosecutions.

Appellants contend that Congress itself could not so narrowly define the rights proscribed by this sweeping previous restraint on the exercise of these fundamental rights.

Appellants do not agree with the District Court that we are here concerned with an order tailored carefully and precisely to meet a particular and defined danger, great and immediate; appellants believe no stronger showing could be made of a situation where fundamental rights of individuals to free speech and assembly have been hacked to size to meet the demands of a corporation.

The principle of *Marsh v. Alabama*, 326 U. S. 501, that the fundamental rights of free speech and assembly occupy a preferred position has been mutilated on the slender ground of a corporation's asserting that its property rights will be injured. On this ground the means of free communication for hundreds of people living in company towns are denied.

The restraint on free speech and assembly contained in the *ex parte* temporary restraining order and the indictment must be judged on their face upon the clear principle laid down in *Thornhill v. Alabama*, 310 U. S. 88 (1940). The indictment



against the appellants is a general one framed in the words of the amended temporary restraining order. The appellees do not have to show that the appellee judge could have constitutionally written a different order covering their actions, for

Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression.

Appellants contend that the mass picketing dicta in the *Thornhill* case cannot be so woodenly and arbitrarily applied that Congress, or the territorial legislature or the defendant judge can, by invoking the use of the words "picketing en masse", justify any restraint on free speech and assembly they see fit to impose. Here the restriction imposed is dangerously close to the lone missionary which the Supreme Court approved in the *Tri-City* case when it regarded picketing as sinister and before the identification of picketing and dissemination of information in labor disputes with free speech and assembly.

As the Supreme Court said in *Norris v. Alabama*, 294 U. S. 587, 590:

When a federal right has been specially set up and claimed in a state court, it is our province to inquire not whether it was denied in express terms, but also whether it was denied in substance and effect.

Appellants contend that the proscription of the *ex parte* temporary restraining order and the charge

of the indictment prohibits the overt act of peaceably assembling, sweeps within its purview conduct well within the bounds of peaceful picketing, and under the guise of regulation of "picketing en masse" deprives appellants under color of territorial law of fundamental constitutional rights.

It comes briefly to this: if this order is valid, a Circuit Court of the Territory can do without hearing what neither the Congress of the United States nor any state legislature has the power to do by law.

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### CONCLUSION.

Appellants respectfully submit that the judgment appealed from should be reversed, the motions to dismiss and for summary judgment should be overruled, and that the injunction *pendente lite* should be restored pending hearing on the merits of appellants' complaint.

Dated, Honolulu, T. H.,  
June 29, 1948.

HARRIET BOUSLOG,  
MYER C. SYMONDS,  
GLADSTEIN, ANDERSEN, RESNER  
& SAWYER,  
By HARRIET BOUSLOG,  
*Attorneys for Appellants.*

(Appendix Follows.)





## **Appendix.**



## Appendix

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### CLAYTON ACT.

#### *Section 1. Statutory restriction of injunctive relief.*

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or



persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peacefully assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

*Section 20. "Person" or "persons" defined.*

The word "person" or "persons" wherever used in section 52 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

**NORRIS-LaGUARDIA ACT.<sup>1</sup>**

*Section 101. Injunction prohibited except as herein provided.*—No Court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act [Chapter]; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act [Chapter].

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<sup>1</sup>29 U.S.C.A. 101-115.

*Section 102. Public policy of United States.*—In the interpretation of this Act [Chapter] and in determining the jurisdiction and authority of the Courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the Courts of the United States are hereby enacted.

*Section 103. Certain undertakings not enforceable by injunction.*—Any undertaking or promise, such as is described in this section, or any other undertaking or promise in section 2 of this Act [§102 of this title]

is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any Court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such Court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

*Section 104. Grounds for injunction limited.*—No Court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;



(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act [§103 of this title];

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any Court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act [§103 of this title.]

*Section 105. Same; combinations or conspiracies.*—No Court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 4 of this Act [§104 of this title.]

*Section 106. Member of union; when not liable for acts of others.*—No officer or members of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any Court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof.

*Section 107. Hearing on sworn complaint; testimony; findings; notice; irreparable injury; period of restraint; undertaking.*—No Court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the Court, to the effect:—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the Court shall direct, to all known persons against whom relief is sought, and also the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: Provided, however, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and



irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the Court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the Court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the Court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the Court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking

from electing to pursue his ordinary remedy by suit at law or in equity.

*Section 108. Person violating obligation not entitled to relief.*—No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

*Section 109. Findings; specific order.*—No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the Court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the Court as provided herein.

*Section 110. Appeal to Circuit Court of Appeals.*—Whenever any Court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the Court shall, upon the request of any party to the

proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the Circuit Court of Appeals for its review. Upon the filing of such record in the Circuit Court of Appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except old matters of the same character.

*Section 111.—Contempt; trial by jury; contempts in presence of Court.*—In all cases arising under this Act [Chapter] in which a person shall be charged with contempt in a Court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed: Provided, That this right shall not apply to contempts committed in the presence of the Court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the Court in respect to the writs, orders, or process of the Court.

*Section 112. Same; disqualification of judge.*—The defendant in any proceeding for contempt of court may file with the Court a demand for the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge and if the attack occurred elsewhere than in the presence of the Court or so



near thereto as to interfere directly with the administration of justice. Upon the filing of any such demand the judge shall thereupon proceed no further, but another judge shall be designated in the same manner as is provided by law. The demand shall be filed prior to the hearing in the contempt proceeding.

*Section 113. What constitutes labor dispute; participants; Courts included.*—When used in this Act [Chapter], and for the purpose of this Act [Chapter]—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employees or associations of employees; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a “labor dispute” (as hereinafter defined) of “persons participating or interested” therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dis-

pute if belief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any Court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the Courts of the District of Columbia.

*Section 114. Partial invalidity.*—If any provision of this Act [Chapter] or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of the Act [Chapter] and the application of such provisions to the other persons or circumstances shall not be affected thereby.

*Section 115. Repealer.*—All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

No. 11,872

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IN THE  
**United States**  
**CIRCUIT COURT OF APPEALS**  
*For The Ninth Circuit*

CONSTANCIO R. ALESNA, JOSE BAGOGO  
BERNAL, DANIEL RODRIGUES FER-  
REIRA, YUTAKA GOHARA, CORNEL  
IHA, MASASHI KAGEYAMA, TOROICHI  
KANDA, FRANK GONSALVES PERREI-  
RA, NOBORU TAKEUCHI, FRED TANI-  
GUCHI and GENKICHI WADA,

*Appellants,*

vs.

PHILIP L. RICE, as Judge of the Circuit  
Court for the Fifth Judicial Circuit of the  
Territory of Hawaii, and WALTER D.  
ACKERMAN, JR., as Attorney General of  
the Territory of Hawaii,

*Appellees.*

**Upon Appeal from the United States District  
Court for the District of Hawaii.**

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**BRIEF OF AMICUS CURIAE**

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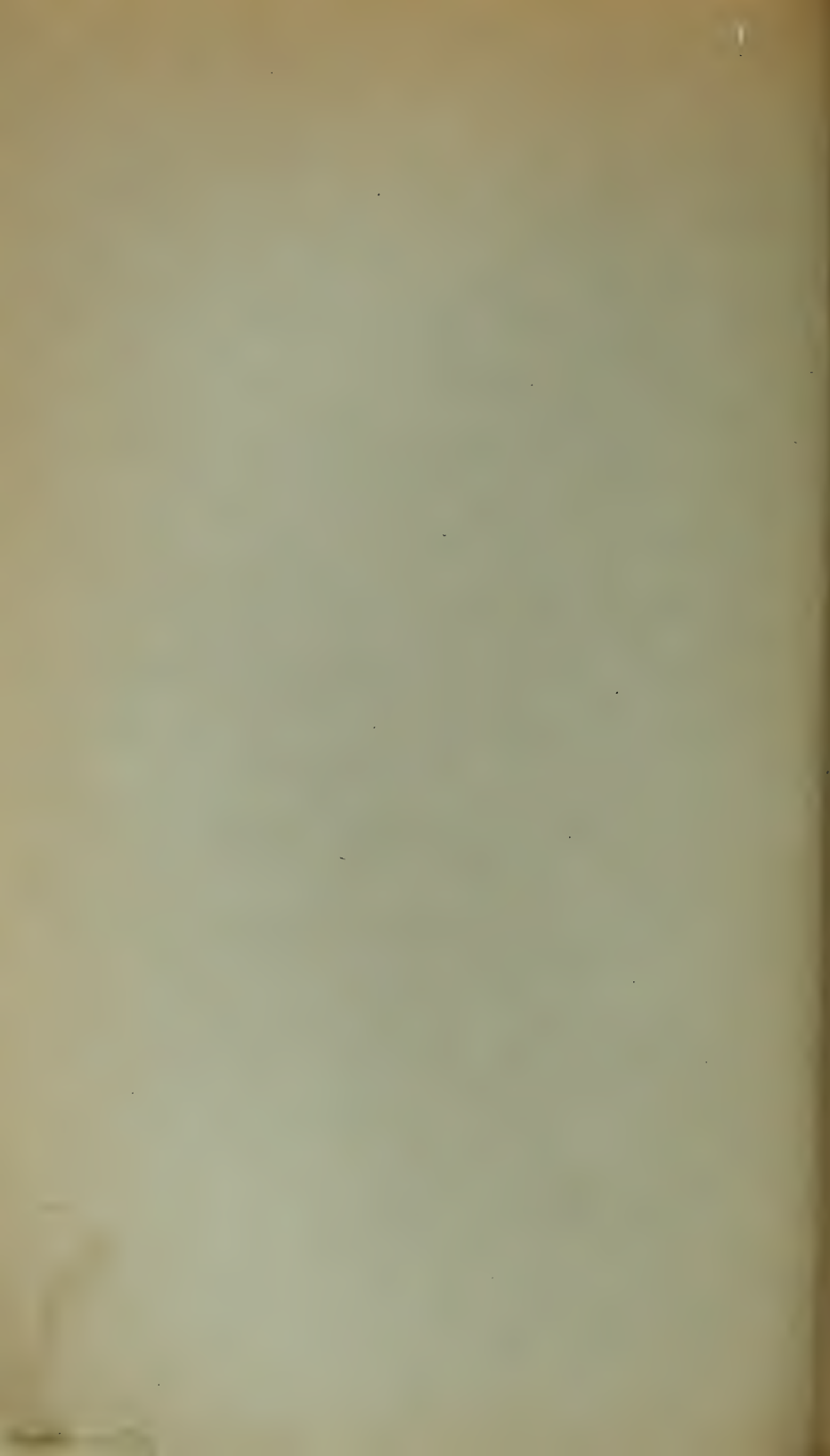
Livingston Jenks  
Bank of Hawaii Building  
Honolulu, Hawaii

*Amicus Curiae for*  
**Hawaii Employers Council**

FILED  
SEP 2 1915

PAUL P. O'BRIEN





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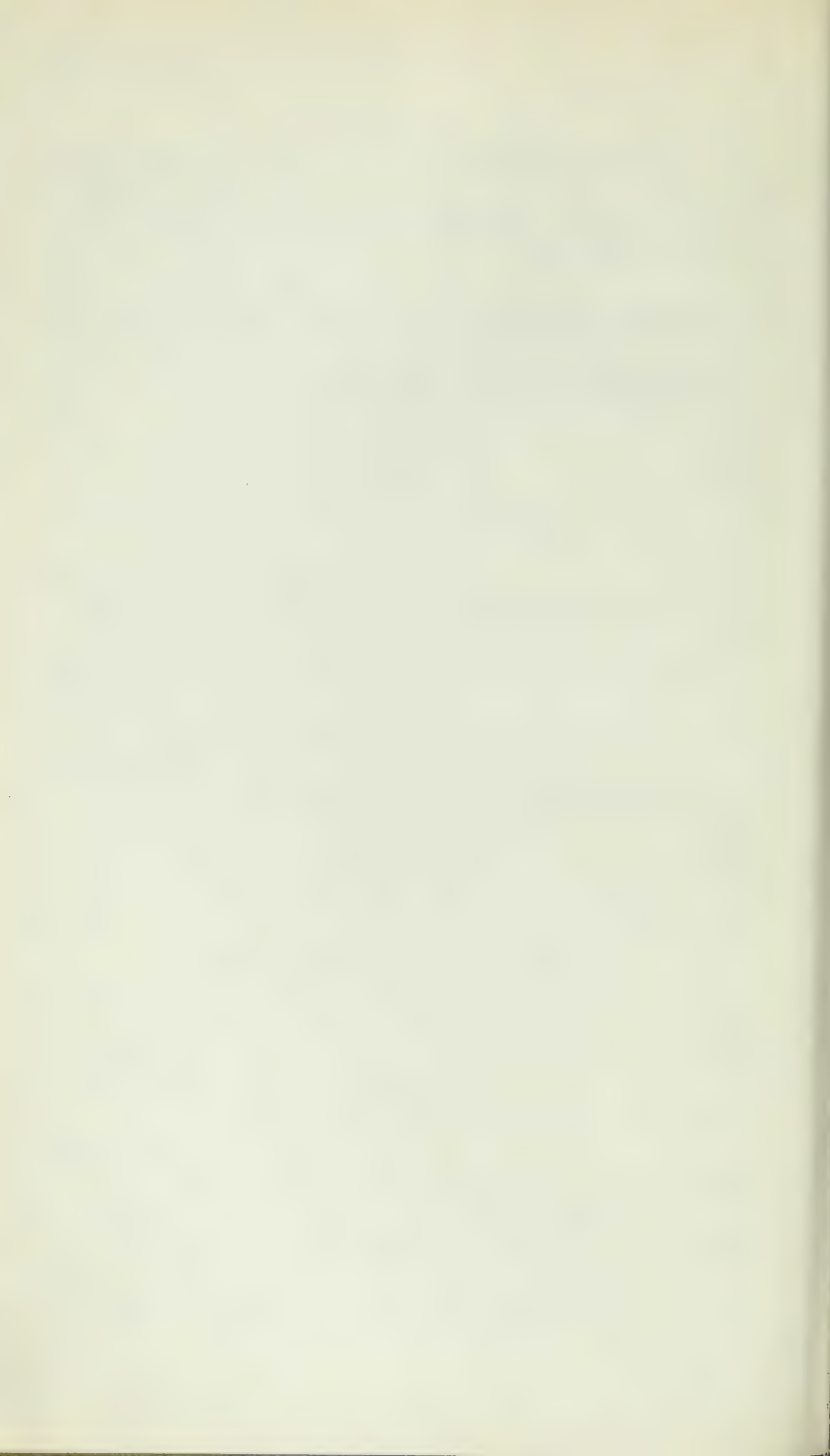
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IN THE  
**United States**  
**CIRCUIT COURT OF APPEALS**  
*For The Ninth Circuit*

CONSTANCIO R. ALESNA, JOSE BAGOGO  
BERNAL, DANIEL RODRIGUES FER-  
REIRA, YUTAKA GOHARA, CORNEL  
IHA, MASASHI KAGEYAMA, TOROICHI  
KANDA, FRANK GONSALVES PERREI-  
RA, NOBORU TAKEUCHI, FRED TANI-  
GUCHI and GENKICHI WADA,

*Appellants,*

vs.

PHILIP L. RICE, as Judge of the Circuit  
Court for the Fifth Judicial Circuit of the  
Territory of Hawaii, and WALTER D.  
ACKERMAN, JR., as Attorney General of  
the Territory of Hawaii,

*Appellees.*

**Upon Appeal from the United States District  
Court for the District of Hawaii.**

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**BRIEF OF AMICUS CURIAE**

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**PART I.**

**RELATIONSHIP OF THE WIRTZ APPEAL  
TO THE INSTANT APPEAL<sup>1</sup>**

During 1946 various locals of the ILWU were  
the certified bargaining agents for employees of

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<sup>1</sup>References herein to the "Wirtz case" and the "Wirtz  
appeal" are to the proceedings commenced by Writ of



practically all of the sugar plantations operating in the Territory of Hawaii.

A strike of employees of such plantations was in effect from September 1, 1946 until November 19, 1946. At some of the plantations the strike brought in its wake coercion and intimidation of nonstriking employees by pickets, mass picketing to obstruct ingress and egress, and other excesses.

On October 17, 1946 Maui Agricultural Company, Limited, one of the plantations, brought a suit for injunction against the ILWU, the appropriate local, and others. The suit was brought in the Circuit Court of the Second Judicial Circuit of the Territory of Hawaii. On the same day Cable A. Wirtz, as Judge of said Circuit Court, issued in the suit a temporary restraining order, hereinafter referred to as the Wirtz order, which restricted and regulated picketing of Maui Agricultural Company, Limited (*Wirtz Tr.* pp. 36-42). The Wirtz order was issued without complying with the procedural provisions of Sections 7, 8 and 9 of the Norris-LaGuardia Act (29 U.S.C. 107, 108, 109).

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Prohibition in the Supreme Court of the Territory of Hawaii entitled *I.L.W.U., et al., Petitioners, vs. Wirtz, et al., Respondents*, No. 2637, reported at 37 H. 404, petition for rehearing denied 37 H. 445, on appeal, No. 11,568 in the Circuit Court of Appeals for the Ninth Circuit.

References herein to the "instant case" and the "instant appeal" are to the suit for injunction brought by the appellants herein in the United States District Court for the District of Hawaii, entitled *Constancio R. Alesna, et al., Plaintiffs, vs. Rice, et al., Dependents*, Civil No. 769, reported in 69 F. Supp. 897 and 74 F. Supp. 865, on appeal, No. 11,872 in the Circuit Court of Appeals for the Ninth Circuit.

At the time of writing this brief, the Circuit Court of Appeals has not handed down its decision in the *Wirtz* appeal.

On November 9, 1946 the *Wirtz* case was commenced by the filing in the Supreme Court of the Territory of Hawaii of a petition for Writ of Prohibition (*Wirtz* Tr. pp. 15-21). The purpose of the *Wirtz* case was to obtain a prohibition against further proceedings in the above mentioned suit in said Circuit Court. The petitioners in the *Wirtz* case were the defendants named in said suit, and the respondents in the *Wirtz* case were Judge Wirtz and Maui Agricultural Company, Limited.

The theory of the petition in the *Wirtz* case was that the Circuit Court of the Second Judicial Circuit is a "court of the United States", within the meaning of that term as defined in Section 13(d) of the Norris-LaGuardia Act (29 U.S.C. 113(d)), and therefore that Judge Wirtz did not have jurisdiction to issue the *Wirtz* order without complying with the procedural provisions of Sections 7, 8 and 9 of the Norris-LaGuardia Act. The petitioners in the *Wirtz* case relied on such procedural provisions,—as is shown by the list, set forth in the Petition for Writ of Prohibition, of the respects in which it was alleged that there was failure to comply with the Norris-LaGuardia Act (*Wirtz* Tr. pp. 19-20).

The joint we particularly wish to make with respect to the *Wirtz* case, and a circumstance in which the *Wirtz* case differed from the instant case, is that in the *Wirtz* case the sole question involved was one of jurisdiction. This was necessarily so with the choice of prohibition as a remedy.

The Supreme Court of the Territory of Hawaii held that a territorial court is not a "court of the United States" and therefore that Judge Wirtz had jurisdiction to issue the *Wirtz* order (37 H. 404; *Wirtz* Tr. pp. 57-70). The Petition for Writ of Prohibition was dismissed by judgment entered on December 18, 1946 (*Wirtz* Tr. pp. 71-72).

The origin of the instant case is similar to, but not identical with, the origin of the *Wirtz* case. On September 16, 1946 The Lihue Plantation Company, Limited, another of the plantations, brought a suit for injunction against the ILWU, the appropriate local, and others. The suit was brought in the Circuit Court of the Fifth Judicial Circuit of the Territory of Hawaii. On September 23, 1946 Philip L. Rice, as Judge of said Circuit Court, issued in the suit an amended temporary restraining order, hereinafter referred to as the Rice order, which restricted and regulated picketing of The Lihue Plantation Company, Limited (Tr. pp. 198-203). The Rice order was issued without compliance with the procedural provisions of the Norris-LaGuardia Act.

On October 29, 1946 Alesna, et al. were indicted for contempt for violating the Rice order (Tr. pp. 32-40). Subsequent to the commencement of the instant case, and pursuant to stipulation entered in the instant case and approved by Judge McLaughlin, an information for summary contempt was substituted for the indictment (Tr. pp. 355-370).

On January 31, 1947 the instant case was commenced by the filing in the United States District Court for the District of Hawaii of a Complaint for Injunction (Tr. pp. 5-46). The purpose of the instant case was to obtain an injunction restraining all further proceedings pursuant to the indictment above referred to. The plaintiffs in the instant case were the persons who had been indicted, i.e., Alesna, et al., and the defendants in the instant case were Judge Rice and the Attorney General of the Territory of Hawaii.

The District Judge held against the plaintiffs in the instant case. See *Alesna vs. Rice* (1947), 74 F. Supp. 865 (Tr. pp. 314-340). The Complaint in the instant case was dismissed by Judgment and Decree



entered on December 22, 1947 (Tr. pp. 343-344).

The appellants in the instant case and the appellants in the *Wirtz* case both raise the jurisdictional question of whether a circuit court of the Territory of Hawaii is a "court of the United States", within the meaning of that term as defined in Section 13(d) of the Norris-LaGuardia Act, and whether a circuit court of the Territory of Hawaii can issue an injunction or restraining order in a labor dispute case without complying with the procedural requirements of the Norris-LaGuardia Act (Tr. pp. 5-12—first count in instant case Complaint—, and p. 380—par. (1)—; Op. Br. pp. 8-9—par. 1—, p. 15—par. 2—, and p. 27 et seq.; *Wirtz* Tr. p. 6—Assignment No. 4 and Assignment No. 5—; *Wirtz* Op. Br. p. 7, p. 16 et seq.). The foregoing jurisdictional question was the principal issue in the *Wirtz* appeal. No argument will be included in this brief with respect to the issue.

The appellants in the instant case and the appellants in the *Wirtz* case also both urge, as an alternative to their position that a circuit court of the Territory of Hawaii is a "court of the United States", that an effect of the Norris-LaGuardia Act is to confer exclusive jurisdiction to issue injunctions and restraining orders in Hawaii in labor dispute cases on the United States District Court for the District of Hawaii (Tr. pp. 12-13—second count in instant case Complaint—, and p. 380—par. (i)—; Op. Br. p. 9—par. 2—, p. 15—par. 3—, and p. 31 et seq.; *Wirtz* Op. Br. pp. 88-90). No argument will be included in this brief with respect to this contention.

The appellants in the instant appeal and the appellants in the *Wirtz* appeal both urge that the restraining orders involved in their respective appeals were in violation of substantive rights claimed by them under Section 20 of the Clayton Act (29 U.S.C.

52) and Section 4 of the Norris-LaGuardia Act (29 U.S.C. 104) (Tr. pp. 13-14—third count in instant case Complaint—, and p. 380—par. (j)—; Op. Br. p. 9—par. 3—, p. 15—par. 4—, and p. 32 et seq.; *Wirtz* Op. Br. pp. 74-82, and related matter pp. 55-74 and 82-88).

However, in the *Wirtz* appeal, the issue of substantive rights is an issue of jurisdiction only—it having been raised on appeal from proceedings commenced by a Petition for Writ of Prohibition. In the *Wirtz* appeal the issue is whether Judge Wirtz had *jurisdiction* to impose certain specified restraints upon picketing. The question of *jurisdiction* in turn depends upon whether the Circuit Court of the Second Judicial Circuit of the Territory of Hawaii is a “court of the United States”. Furthermore, if said Circuit Court is a “court of the United States”, then the appellants in the *Wirtz* appeal must prevail, irrespective of the issue of substantive rights. It follows that a determination of the issue of substantive rights is not necessary to the disposition of the *Wirtz* appeal.

On the other hand, in the instant appeal, the issue of substantive rights arises independently of any question of jurisdiction. For the foregoing reason this brief will include, in Part IV, argument with respect to the issue of substantive rights.<sup>1</sup>

The instant appeal also involves the issue of

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<sup>1</sup>To a large extent the argument in this brief on the issue of substantive rights uses the same thoughts and language as were used in the Answering Brief of Maui Agricultural Company, Limited in the *Wirtz* case. In part this matter was first used by us in briefs filed in the instant case in the District Court and was used by counsel for Maui Agricultural Company, Limited with our consent. In part this matter was first used by counsel for Maui Agricultural Company, Limited in said Answering Brief and is used by us with his consent.

whether the Rice order was in violation of the constitutional right of freedom of speech and the constitutional right peaceably to assemble (Tr. pp. 14-20—fourth count in instant case Complaint—, and p. 380—par. (k)—; Op. Br. p. 9—par. 4—, p. 15—par. 5—, and p. 42 et seq.). The constitutional issue was not involved in the *Wirtz* appeal. This brief will include, in Part III, argument with respect to the constitutional issue.

There is also involved in the instant appeal various questions having to do with the relationships between the United States District Court for the District of Hawaii and the courts of the Territory of Hawaii. This brief will include, in Part V, our position with respect to these matters.

In the instant appeal the appellants have raised questions with respect to procedural problems which arose in connection with various motions made in the District Court (Tr. p. 379—par. (f)—and par. (g)—; Op. Br. pp. 12-13, p. 15—par. 1—, and pp. 16-26). As will be shown more fully *infra* it is our position that the complaint in the instant case does not state any claim for relief and that therefore the action of Judge McLaughlin in dismissing the complaint was correct and should be sustained, irrespective of any procedural intricacies involved in the proceedings in the District Court.

## PART II

### SUMMARY OF ARGUMENT<sup>1</sup>

#### A. The Constitutional Issue (pages 11 to 36)

The United States Constitution protects the right of freedom of speech and the right peaceably to assemble.

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<sup>1</sup>Reference is made to the Table of Contents for data with respect to page locations of details of argument.



The foregoing constitutional guarantees do not prohibit an injunction or restraining order from regulating picketing or even from prohibiting picketing altogether under appropriate factual circumstances. An injunction or restraining order which regulates picketing may be adjusted to the particular factual situation in accordance with the well settled practice of equity.

The Rice order prohibited obstruction (by mass picketing or otherwise), intimidation, coercion and offensive and disorderly conduct. In addition paragraph (7) of the Rice order prohibited mass picketing and congregating in crowds to interfere with ingress and egress. The Rice order also limited to three the number of pickets at points of ingress and egress and provided that pickets in excess of three at any other point should be in motion and should maintain a distance of not less than three feet except when passing. The appellants face prosecution for violating the provisions of the Rice order referred to in the two foregoing sentences of this paragraph.

The Rice order did not interfere with the constitutional right of freedom of speech or with the constitutional right peaceably to assemble.

Numerous cases hold that the constitutional guarantees do not give the right to engage in mass picketing to obstruct ingress or egress and hold further that, notwithstanding the constitutional guarantees, injunctions or restraining orders may prohibit mass picketing to obstruct ingress or egress and may limit the number of pickets.

There is no basis for various objections made by the appellants to the Rice order,—such objections relating to mass picketing, limitations of numbers, the fact that the Rice order was issued *ex parte*, the numbers of persons restrained, the geographical extent of the

restraints, and the use of alleged vague and indeterminate language.

The invalidity of any portion of the Rice order would not affect the validity of the remainder.

The contention by the appellants that the Rice order was unconstitutional on its face is untenable. An injunction or restraining order which regulates picketing may be adjusted to a particular factual situation. It necessarily follows that such an injunction or restraining order cannot be held to be invalid on its face.

#### **B. The Issue of Substantive Rights (pages 36 to 58).**

The last clause of the second paragraph of Section 20 of the Clayton Act provides that none of the specified acts listed in said second paragraph shall be considered or held to be in violation of any law of the United States. The last clause is the basis of substantive rights under Section 20. The purpose of the last clause was primarily to amend the substantive aspects of the Sherman Act and secondarily to amend the substantive aspects of any other federal legislation which might be interpreted to prohibit any of the specified acts. There was no purpose to amend local law, state or territorial, on matters relating to the maintenance of peace and order, and having no relation to the antitrust laws or any such other federal legislation.

The specified acts listed in Section 4 of the Norris-LaGuardia Act are in *pari materia* with the specified acts listed in Section 20 of the Clayton Act.

The specified acts listed in Section 20 and in Section 4 modify the impact in the Territory of Hawaii of the Sherman Act (and of any other federal legislation which may be pertinent) but do not state the substantive law of the Territory. The fact that the

specified acts are declared to be not in violation of any federal legislation does not mean that they are not or can not be in violation of local territorial law.

The term "law of the United States", as used in Section 20 has a well defined meaning which does not include the law of a territory.

A limitation upon the normal police powers of a territory is not to be implied.

Assuming that the substantive aspects of Section 20 and Section 4 affect the local law of the Territory of Hawaii, nevertheless the Rice order did not deprive the appellants of substantive rights under said sections. The substantive rights relied on by the appellants relate to "giving publicity" and "assembling peaceably". These are no broader than the constitutional right of freedom of speech and the constitutional right peaceably to assemble. Therefore such regulations of picketing which are permitted notwithstanding the constitutional rights are also permitted notwithstanding the substantive rights. It follows that the Rice order was not inconsistent with the substantive rights.

### **C. The Relationship Between the District Court and the Courts of the Territory of Hawaii (pages 59 to 69).**

Under the Hawaiian Organic Act the courts of the Territory of Hawaii are in a relatively similar position to the federal judicial system as are the courts of the United States. If a constitutional district court is precluded by statute or rule of law from interfering with state court proceedings similar to the proceedings in which the Rice order was issued, the District Court for the Territory of Hawaii is likewise precluded from interfering with the territorial court proceedings.

Interference by a constitutional district court in



similar state court proceedings is prohibited by Section 265 of the Judicial Code. Actions under the Civil Rights Act do not constitute an exception to Section 265.

Interference by a constitutional district court in similar state court proceedings would not be justified, even in the absence of Section 265. The appellants do not face any injury other than that incidental to any criminal prosecution brought lawfully and in good faith. The constitutionality of the Rice order may be determined as readily in the contempt proceedings pending against the appellants (including appellate proceedings with respect thereto) as in the instant case brought by them (including appellate proceedings with respect thereto).

The judges of the circuit courts of the Territory are best qualified to determine the provisions to be incorporated in injunctions or restraining orders regulating picketing. There is no practical reason why the District Court for the District of Hawaii should supervise labor injunction proceedings in the territorial courts.

#### **D. Conclusion: The Complaint in the Instant Case was Properly Dismissed (pages 69 to 71).**

The complaint in the instant case does not state any claim for relief. The dismissal of the action should be affirmed.

### **PART III**

## **THE AMENDED TEMPORARY RESTRAINING ORDER WAS NOT IN VIOLATION OF THE CONSTITUTIONAL RIGHTS OF THE APPELLANTS OR ANY OF THEM OF FREEDOM OF SPEECH AND PEACEABLY TO ASSEMBLE**

#### **A. Introduction.**

The First Amendment to the Constitution of the United States provides that:

“Congress shall make no law \* \* \* abridging the freedom of speech, \* \* \* or the right of the people peaceably to assemble, \* \* \*.”

The government of the Territory of Hawaii and its various branches exist and act pursuant to authority granted by congress. The Territory of Hawaii is an incorporated territory of the United States. It may be assumed therefore that the limitations on Congressional action imposed by the First Amendment operate also as limitations on action by the territorial government and its various branches. Compare *Farrington vs. Tokushige* (1927), 273 U.S. 284 47 S. Ct. 406, in which it was held that the Fifth Amendment operates to limit action by the territorial legislature and officers.

The First Amendment by its language operates only as limitations on Congressional action. However, a long line of authorities establish that the freedoms guaranteed against federal encroachment by the First Amendment, including freedom of speech and the right peaceably to assemble, are protected by the provisions of Section 1 of the Fourteenth Amendment against abridgments by the states. See *Hague vs. C.I.O.* (1939), 307 U. S. 496, 59 S. Ct. 954, and *Thornhill vs. Alabama* (1940), 310 U.S. 88, 95, 60 S. Ct. 736, 740. It follows that decisions relating to the scope of the constitutional right of freedom of speech and the scope of the constitutional right peaceably to assemble are equally applicable whether they have been rendered in connection with action by the federal government or action by a territorial government or action by a state government.

Those of the appellants who are citizens of the United States contend that the Rice order was in violation of their rights under the First Amendment in that it constituted an abridgement of “freedom

of speech" and of the right "peaceably to assemble" (Tr. pp. 14-20; Op. Br. pp. 42-47). It appears desirable therefore to set forth here an analysis of the Rice order.

### **B. Analysis of Amended Temporary Restraining Order.**

The Rice order prohibited the ILWU, Local 149 of the ILWU, Unit 1 of Local 149, and individuals, from taking certain specified actions listed in seven numbered paragraphs (Tr. pp. 200-202). The Rice order also, following paragraph numbered (7), provided for limitations on the numbers of pickets by providing that there should be not more than three pickets in a group at any point of ingress to and egress from the real property of The Lihue Plantation Company, Limited, and that pickets in excess of three at any other point should be in motion and should maintain a distance of not less than ten feet except when passing (Tr. pp. 202-203).

In the first count of the information against the appellants they are charged with violating paragraph (7) in that they engaged in mass picketing to obstruct ingress and egress (Tr. pp. 358-361). In the second count of the information against the appellants they are charged with violating the limitations on the numbers of pickets in that they picketed in groups of more than three at points of ingress and egress (Tr. pp. 361-364).

It appears therefore that paragraphs (1) to (6) of the Rice order are not involved in the instant appeal. Furthermore the Appellants' Opening Brief does not contain any contentions with respect to such paragraphs. We will therefore not discuss such paragraphs, other than to state in general that they prohibited obstruction (by mass picketing or otherwise), intimidation, coercion, and offensive and disorderly conduct.



Paragraph (7) dealt with mass picketing and congregating in crowds on or near the real property of The Lihue Plantation Company, Limited. Paragraph (7) did not prohibit mass picketing and congregating in crowds generally, but prohibited the same only if employed for a specified purpose, i.e.:

“to thereby prevent or attempt to prevent or in any manner physically obstruct or interfere with ingress to or egress from said real property \* \* \*”.

Paragraph (7) did not restrict freedom of speech. Also it did not restrict the right peaceably to assemble. Notwithstanding the provisions of paragraph (7) the appellants and all other persons were left free to exercise their constitutional right of freedom of speech and also to exercise their constitutional right peaceably to assemble. Under paragraph (7) they were merely prohibited from massing or congregating for the purpose of obstructing ingress or egress. Paragraph (7) did not prohibit assembling for other purposes.

Presumably the provision imposing limitations on numbers was included in the Rice order because Judge Rice came to the conclusion that mass picketing to obstruct ingress or egress could not effectively be eliminated unless the numbers of pickets were limited.

The provision imposing limitations on numbers did not interfere with freedom of speech. It permitted ample opportunity to advertise the facts of the labor dispute. The provision did not eliminate picketing at any place or places whatsoever. The provision merely limited to three the number of pickets at points of ingress and egress and provided that pickets in excess of three at any other point should act in accordance with specified standards of reasonable conduct. The provision did not impose any limitation in the aggregate number of pickets.

Furthermore the provision imposing limitations on numbers did not interfere with the right peaceably to assemble. It regulated picketing only. Assembling other than in connection with picketing was not affected.

### C. Constitutional Basis of Picketing.

Prior to 1937 the right to picket was thought of as a part of the right to strike and was limited to peaceful picketing in connection with a lawful strike. See *Teller, Picketing and Free Speech*, 56 Harvard Law Review, 180.

In *Senn vs. Tile Layers Union* (1937), 301 U.S. 468, 478, 57 S. Ct. 857, 862, the Supreme Court announced in a dictum as follows:

“Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.”

The foregoing dictum is the starting point for the present constitutional basis for picketing.

The next decisions of the United States Supreme Court on the subject of picketing were in the comparison cases of *Thornhill vs. Alabama* (1940), 310 U.S. 88, 60 S. Ct. 736, and *Carlson vs. California* (1940), 310 U.S. 106, 60 S. Ct. 746.

The *Thornhill* case involved the validity of an Alabama statute directed against picketing. The statute prohibited the picketing of a place of lawful business for the purpose of impeding, interfering with, or injuring such business. As construed by the Alabama courts the statute forbade the publicizing of facts concerning a labor dispute, whether by printed sign, by pamphlet, by word of mouth, or otherwise, in the vicinity of the business involved, without regard to the number of persons engaged in the activity and without regard to the peaceable

character of their conduct. The Supreme Court held that the statute was in violation of the Federal Constitution and particularly the guarantees against freedom of speech and of discussion. The statute was invalid because it prohibited all picketing, peaceful or otherwise. This is made clear by the language in the opinion (310 U.S. 88, 105, 60 S. Ct. 736, 746) as follows:

“We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger. Compare *American Foundries v. Tri-City Council*, 257 U.S. 184, 205. Section 3448 in question here does not aim specifically at serious encroachments on these interests and does not evidence any such care in balancing these interests against the interest of the community and that of the individual in freedom of discussion on matters of public concern.”

The *Carlson* case involved the validity of an ordinance of Shasta County, California. The ordinance made it unlawful for any person to carry or display any sign, banner or badge in the vicinity of any place of business for the purpose of inducing others to refrain from buying or working there or for any person to loiter or picket in the vicinity of any place of business for such purpose. The Supreme Court held the ordinance to be unconstitutional, on the authority of the *Thornhill* case.

The next decision of the Supreme Court on the subject of picketing was in *Drivers Union vs. Meadowmoor Co.* (1941), 312 U.S. 287, 61 S. Ct. 552, affirming a decision of the Illinois Supreme Court, 371 Ill. 377, 21 N.E. 2d. 308. The case arose out of the suit of Meadowmoor Dairies, Incorporated, a distributor of milk, to enjoin the Milk Wagon Drivers' Union of Chicago, its members, and others, from picketing



stores where milk distributed by Meadowmoor Dairies, Incorporated was sold. The suit was brought in equity in the Superior Court of Cook County, Illinois. A preliminary injunction was issued which imposed an absolute prohibition against picketing. Hearings were then held before a master, who recommended that a permanent injunction be issued prohibiting all picketing. The trial court, however, accepted the recommendations of the master only as to acts of violence, and issued an injunction which permitted peaceful picketing. The Supreme Court of Illinois reversed the action of the trial court and ordered that the injunction prohibit all picketing. The action of the Supreme Court of Illinois was affirmed by the United States Supreme Court. The approval by the Supreme Court of an injunction prohibiting all picketing was based on the findings of the master, approved by the Illinois Supreme Court, to the effect that the picketing had involved flagrant violence.

The *Drivers Union* case involved the issuance of a specific injunction by an equity court in accordance with the general chancery jurisdiction of the equity court<sup>1</sup>. In this respect the *Drivers Union* case was different from the *Thornhill* and *Carlson* cases, which had involved convictions for violations of an anti-picketing statute and an anti-picketing ordinance.

The distinction between a specific injunction or restraining order on the one hand and a statute or ordinance on the other hand, and the possibility of fitting a specific injunction or restraining order to

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<sup>1</sup>The case did involve the question of whether an Illinois Anti-Injunction Act limited the power of the equity court. The Illinois Supreme Court held that the Act did not apply. The result was that the equity court was empowered to act in accordance with its general chancery jurisdiction.

the facts, in accordance with the settled practice of equity, are stated in the opinion in the *Drivers Union* case in the following language (312 U.S. 287, 292-293, 297, and 298, 61 S. Ct. 552, 554-557) :

"Such a decree, arising out of a particular controversy and adjusted to it, raises totally different constitutional problems from those that would be presented by an abstract statute with an overhanging and undefined threat to free utterance. To assimilate the two is to deny to the states their historic freedom to deal with controversies through the concreteness of individual litigation rather than through the abstractions of a general law.

\* \* \*

"We do not qualify the *Thornhill* and *Carlson* decisions. We reaffirm them. They involved statutes baldly forbidding all picketing near an employer's place of business. Entanglement with violence was expressly out of those cases. The statutes had to be dealt with on their face, and therefore we struck them down. Such an unlimited ban on free communication declared as the law of a state by a state court enjoys no greater protection here. *Cantwell v. Connecticut*, 310 U. S. 296; *American Federation of Labor v. Swing*, post p. 321. But just as a state through its legislature may deal with specific circumstances menacing the peace by an appropriately drawn act, *Thornhill v. Alabama*, *supra*, so the law of a state may be fitted to a concrete situation through the authority given by the state to its courts. This is precisely the kind of situation which the *Thornhill* opinion excluded from its scope. 'We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger . . . as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger.

\* \* \*

"The exercise of the state's power which we are sustaining is the very antithesis of a ban on all discussion in Chicago of a matter of public importance. Of course we would not sustain such a ban. The in-

junction is confined to conduct near stores dealing in respondent's milk, and it deals with this narrow area precisely because the coercive conduct affected it. An injunction so adjusted to a particular situation is in accord with the settled practice of equity, sanctioned by such guardians of civil liberty as Mr. Justice Cardozo. Compare *Nann v. Raimist*, 255 N. Y. 307; 174 N. E. 690. Such an injunction must be read in the context of its circumstances. Nor ought state action be held unconstitutional by interpreting the law of the state as though, to use a phrase of Mr. Justice Holmes, one were fired with a zeal to pervert."

When the appellants in the instant appeal were before the District Court they relied on the reference in the *Thornhill* opinion to "a statute narrowly drawn to cover the precise situation giving rise to the danger." This language was used in the *Thornhill* opinion to indicate that although the statute in that case, which prohibited all picketing, was unconstitutional, a state statute narrowly drawn to cover a precise danger, such as mass picketing, would be constitutional.

Appellants argued that the Rice order was not narrowly drawn and was therefore unconstitutional under the ruling of the *Thornhill* case. In this respect the appellants failed to recognize the distinction, pointed out in the *Drivers Union* opinion, between a specific injunction or restraining order on the one hand and a statute or ordinance on the other hand. (In this connection the following might be mentioned: Mr. Justice Black dissented in the *Drivers Union* case. In his dissenting opinion (112 U.S. 299, 308-309, 61 S. Ct. 558, 562-563), he pointed out that an Illinois statute which prohibited all picketing would have been held invalid under the rule of the *Thornhill* case, and he argued from this fact that the injunction itself should have been held invalid under the same rule. In other words, he contended that



there should not be any distinction between a specific injunction or restraining order on the one hand and a statute or ordinance on the other hand. However his position was not accepted by the majority of the Court.)

The *Drivers Union* case establishes that the First Amendment does not protect all picketing and does not prevent governmental agencies from prohibiting unlawful picketing. The doctrine of the *Drivers Union* case is that a specific injunction or restraining order may be adjusted to a particular situation in accordance with the settled practice of equity. The *Drivers Union* case holds further that where picketing has involved flagrant violence, a specific injunction or restraining order may impose an absolute prohibition against picketing.

Many controversies require that there be regulations of picketing, in order to convert unlawful picketing into peaceful picketing, but do not require the drastic remedy of eliminating all picketing. For example, if the facts of a controversy as found by an equity judge indicate that mass picketing has been used as a means of obstructing ingress and egress, but indicate further that the elimination of all picketing would not be justified, the situation can be met by prohibiting mass picketing for the purpose of obstructing ingress and egress and by limiting the numbers of pickets. Cases dealing with situations wherein equity judges have regulated picketing, without imposing absolute prohibitions, are referred to subsequently in this brief in Part III D.

Subsequent decisions of the Supreme Court dealing with the subject of picketing are *A. F. of L. vs. Swing* (1941), 312 U.S. 321, 61 S. Ct. 568; *Bakery & Pastry Drivers vs. Wohl* (1941), 313 U.S. 548, 61 S. Ct. 1108; *Hotel Employees' Local vs. Board* (1942), 315

U.S. 437, 62 S. Ct. 706; *Carpenters Union vs. Ritter's Cafe* (1942), 315 U.S. 722, 62 S. Ct. 807; *Allen-Bradley Local vs. Board* (1942), 315 U.S. 740, 62 S. Ct. 820; and *Cafeteria Union vs. Angelos* (1943), 320 U.S. 293, 64 S. Ct. 126. For the most part the cases above listed are not significant to the issues in the instant appeal.

In both the *Drivers Union* case and in the *Carpenters Union* case the Supreme Court upheld injunctions against picketing. In both of these cases Mr. Justice Reed dissented,—thus indicating that he is more solicitous of the right to picket than are the majority of his brethren of the Supreme Court. Nevertheless in his dissent he recognized that the constitutional right of freedom of speech and the constitutional right peaceably to assemble do not protect mass picketing to obstruct ingress and egress and do not prevent the imposition of reasonable restrictions on picketing including restrictions on the numbers of pickets. In his dissenting opinion in the *Drivers Union* case he stated (312 U.S. 317, 318-319, 61 S. Ct. 566, 567):

“Where nothing further appears, it is agreed that peaceful picketing, since it is an exercise of freedom of speech, may not be prohibited by injunction or by statute. *Thornhill v. Alabama*, 310 U.S. 88; *American Federation of Labor v. Swing, Post*, p. 321. It is equally clear that the right to picket is not absolute. It may, if actually necessary, be limited, let us say, to two or three individuals at a time and their manner of expressing their views may be reasonably restricted to an orderly presentation. *Thornhill v. Alabama, supra*, 105. From the standpoint of the state, industrial controversy may not overstep the bounds of an appeal to reason and sympathy.”

In his dissenting opinion in the *Carpenters Union* case he stated (315 U.S. 732, 738-739, 62 S. Ct. 812, 815):

"We do not doubt the right of the state to impose not only some but many restrictions upon peaceful picketing. Reasonable numbers, quietness, truthful placards, open ingress and egress, suitable hours or other proper limitations, not destructive of the right to tell of labor difficulties, may be required."

#### **D. Cases Upholding Injunctions Regulating Picketing.**

It appears to be clear from the opinions in the *Thornhill* and *Drivers Union* cases that the constitutional guarantees do not prevent local governments, whether state or territorial, through their judicial branches, from imposing reasonable regulations on picketing by injunctions or restraining orders which are adjusted to the factual situations presented.

There are listed below various state court decisions wherein injunctions or restraining orders regulating picketing have been granted or approved. The opinions in most of these state court cases have been handed down subsequent to the establishment by the United States Supreme Court of the constitutional basis for picketing. The state court cases are in accord with the rule of the Supreme Court as evidenced particularly by its opinions in the *Thornhill* and *Drivers Union* cases. The state court cases recognize that peaceful picketing is an exercise of the right of freedom of speech and as such is protected by the Constitution. They recognize that the purpose of peaceful picketing is to permit strikers and others in a labor dispute to make their position known to the public. They recognize on the other hand that if picketing is not confined to persuasion, but extends to intimidation or interference with the rights of others, then it is not protected by the Constitution. More specifically, and with reference to the issues involved in the instant appeal, they recognize that mass picketing to obstruct ingress or egress is unlawful and may be restrained and in con-



nection therewith that the numbers of pickets may be limited.

There follows a list of state court cases, with certain comments with respect thereto bearing on the issues involved in the instant appeal:

*Weyerhaeuser Timber Co. vs. Everett Dist. Council* (1941), 11 Wash. 2d. 503, 119 P. 2d. 643:—decree which prohibited picketing in any manner other than by maintaining not more than five pickets or persons at or near the main entrances to plaintiff's mills B and C, approved (p. 644<sup>1</sup>): the facts showed that the picketing involved the threat of violence inherent in mass picketing and also some actual threats of violence but this did not justify a prohibition against all picketing (p. 645).

*Isolantite vs. United Elec., Radio and Mach. Workers* (1942), 132 N. J. Eq. 613, 29 Atl. 2d. 183:—restraining order which limited pickets to ten on the sidewalks or street in front of complainant's plant and which required pickets to be spaced at least ten feet apart approved, subject to clarification to permit pickets elsewhere than in front of complainant's plant (pp. 187-188); such restrictions held not to be in violation of right of free speech (p. 187); the facts showed that mass picketing had been planned to intimidate workers and employers (p. 187); limitations on numbers of pickets and spacing of pickets held reasonable to protect co-relative rights of all persons (p. 187).

*Westinghouse Elec. Corp. vs. United E. R. & M. Workers* (1946), 353 Pa. 446, 46 Atl. 2d. 16:—circular or elliptical line with pickets close together indicates intent to deny right of ingress and egress (p. 20); denial of right of ingress and egress amounts to seizure of property under Pennsylvania Anti-Injunction Act (p. 21); injunction ordered

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<sup>1</sup>Where more than one case citation is given, page references are to the citation in the National Reporter System.

against mass picketing to prevent ingress or egress (p. 21) ; such picketing held not to be protected by constitutional guarantees (p. 21).

*United States El. Motors vs. United E. R. & M. Workers* (1946), 166 P. 2d. 921, Superior Court of California, Los Angeles County:—temporary restraining order had prohibited mass picketing for the purpose of obstructing ingress or egress and had limited the number of pickets to four at each of six entrances and had required that they be spaced ten feet apart except when passing (p. 922) ; order had subsequently been modified to eliminate restrictions on numbers of pickets (p. 922) ; obstruction of ingress or egress held unlawful (p. 923) ; a court of equity has power to enjoin mass picketing under appropriate factual circumstances (p. 924) ; this may be easily and effectively accomplished by limiting the number of pickets (p. 924) ; opinion directed entry of preliminary injunction to prohibit obstructing by walking, marching or standing in groups or masses, and to limit the number of pickets to ten at or in front of or in the immediate vicinity of any one of six entrances and to require that they be spaced four feet apart except when passing (p. 925).

*Goldwyn vs. Screen Set Designers, Illustrators and Decorators* (1945), (not officially reported), 10 Labor Cases 68035 (paragraph 62751), Superior Court of California, Los Angeles County:—the constitutional right of free speech protects peaceful picketing (p. 68037) ; “the congregation of a large number of pickets is not calculated to appeal to the reasoning powers of persons who come into contact with the picket line, but is an exhibition of force” (p. 68037) ; the number of pickets may be limited so as to eliminate intimidation and interference with ingress and egress (p. 68038) ; no cases hold that the number of pickets cannot be reasonably limited (p. 68039) ; the facts did not justify an injunction restraining all picketing but did justify the limitation of the number of pickets and the regulation of their acts (p. 68040).

*Lisse vs. Local Union No. 31, Cooks, Waiters, Etc.* (1935), 2 Cal. 2d. 312, 41 P. 2d. 314:—mass picketing held to be unlawful (p. 315); statement of court as follows (p. 316): “In this regard it is held that, in order to prove physical intimidation and fear, it is not necessary to show that there was actual force or express threats of physical violence used; that such result may be accomplished as effectually by obstructing and annoying others and by insult and menacing attitude as by physical assault.”

*Goldfinger vs. Feintuch* (1937), 276 N. Y. 281, 11 N. E. 2d. 910: statement of court as follows (p. 912): “Picketing is not peaceful where a large crowd gathers in mass formation, or there is shouting or the use of loud-speakers in front of a picketed place of business, or the sidewalk or entrance is obstructed by parading around in a circle or lying on the sidewalk. Such actions are illegal, and are merely a form of intimidation.”

*New England Novelty Co. vs. Sandberg* (1944), 315 Mass. 739, 54 N. E. 2d. 915:—injunction had limited pickets to two at each entrance to a factory (p. 920); convictions for violation of injunction upheld.

*Western Electric Co. vs. Western Electric Emp. Ass'n.* (1946), 137 N. J. Eq. 489, 45 Atl. 2d. 695:—order to show cause limited pickets to ten at two entrance gates and five at other gates and required pickets to remain at least ten feet apart (p. 697); mass picketing to obstruct ingress and egress is not peaceful picketing and is unlawful (p. 697).

*General Electric Company vs. Andrew Peterson, et al.* (1946), 61 N. Y. Supp. 2d. 813 Supreme Court of New York, Schenectady County:—mass picketing and interfering with ingress and egress enjoined (p. 820); pickets limited to not more than twelve at main entrance and not more than three at other entrances, and pickets required to remain in motion and spaced in a single line at least fifteen feet apart (p. 821).



*General Electric Co. vs. United E. R. & M. Workers* (1946), 67 N. E. 2d. 802, Ohio, Court of Common Pleas, Cuyahoga County:—restraining order limited pickets to five at each of designated entrances to a factory (p. 802); violators of restraining order punished for contempt (p. 805).

## **E. The Amended Temporary Restraining Order was Constitutional under the Authorities.**

### **1. Preliminary Statement.**

The appellants apparently urge several bases for their contention that the Rice order was in violation of the right of freedom of speech and the right peaceably to assemble, as follows: (1) that the Rice order prohibited mass picketing; (2) that the Rice order imposed unreasonable limitations on the numbers of pickets; (3) that the Rice order was issued *ex parte* and without finding of great and imminent danger to the state and public; (4) that the Rice order was too broad in that it restrained too many persons; (5) that the Rice order was too broad geographically; and (6) that the Rice order contained vague and indeterminate language (Op. Br. pp. 42-47).

### **2. Mass Picketing.**

We have already shown that the authorities establish that mass picketing to obstruct ingress and egress is not the exercise of the right of freedom of speech or the right peaceably to assemble, and that mass picketing for such purpose may be enjoined. Reference is made to the opinion in the *Thornhill* case, to the dissents of Mr. Justice Reed in the *Drivers Union* and *Carpenters Union* cases, and to the state court cases discussed in Part III D of this brief.

### **3. Limitations on Numbers.**

We have already shown that the authorities establish that limitations on the numbers of pickets such

as were provided for by the Rice order do not violate the constitutional guarantees. Reference is made to the dissents of Mr. Justice Reed in the *Drivers Union* and the *Carpenters Union* cases, and to the state court cases discussed in Part III D of this brief.

In one respect the Rice order was more restrictive than most injunctions and restraining orders discussed in the authorities above referred to. This is the limitation to three of the number of pickets at each point of ingress and egress. However, such limitation was in accordance with the dissent of Mr. Justice Reed in the *Drivers Union* case, in which he suggested that the number of pickets might be limited to two or three individuals at a time. Also in *New England Novelty Co. vs. Sandberg* (1944), 315 Mass. 739, 54 N.E. 2d. 915, *supra*, convictions for violation of an injunction were upheld where the injunction had limited pickets to two at each entrance to a factory.

In another respect the Rice order was less restrictive than most of the injunctions and restraining orders discussed in the authorities above referred to,—in that the Rice order did not prohibit picketing anywhere. The Rice order did not limit the number of pickets other than at points of ingress and egress, and it permitted any number of pickets at other points, including approaches to points of ingress and egress, subject to the proviso that pickets in excess of three at any one point should be in motion and maintain a distance of not less than ten feet except when passing.

#### 4. *Ex parte.*

Section 55 of the Hawaiian Organic Act (48 U. S.C. 562) provides that the legislative power of the Territory of Hawaii shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applic-

able. Acting under the authority contained in Section 55, the territorial legislature has granted to the territorial circuit judges full equity jurisdiction (Revised Laws of Hawaii, 1945, chapter 302). There can be no question but that full equity jurisdiction includes the right and power in appropriate cases to issue *ex parte* temporary restraining orders.

*Ex parte* temporary restraining orders are of short duration. Provision is always made by order to show cause for a hearing upon motion for a temporary injunction or permanent injunction. The defendants are entitled to proceed on the order to show cause. Where an *ex parte* temporary restraining order continues in existence for a longer period than above indicated, as was the case with respect to the Rice order, such can happen only with the approval or acquiescence of the parties.

Relatively few reported cases deal with *ex parte* temporary restraining orders in suits to enjoin picketing. No doubt this is because of the short duration of such orders and of the further fact that appeals, if taken, are customarily taken from subsequent injunctions. However, we note references to *ex parte* temporary restraining orders in *United States El. Motors vs. United E. R. & M. Workers* (1946), 166 P. 2d. 921, 922, *supra*, and in *Western Electric Co. vs. Western Electric Emp. Ass'n.* (1946), 137 N.J. Eq. 489, 45 Atl. 2d. 695, 697, *supra*. Furthermore, in *Frankfurter and Green, The Labor Injunction*, published in 1930, the statement is made on page 64 that reported cases disclose that not less than seventy *ex parte* temporary restraining orders had been granted during the previous twenty-seven years. We have no doubt that during the same period there were many more which were not either reported or referred to in reported cases. Also we have no doubt that many have been granted by state courts in more recent years.



Although *ex parte* temporary restraining orders in suits to enjoin picketing have been criticised on policy grounds, we know of no authority which has held them to be unconstitutional, and appellants have cited no such authority.

It is true that Section 7 of the Norris-LaGuardia Act (29 U.S.C. 107) prohibits courts of the United States from issuing such *ex parte* temporary restraining orders. The express prohibition in Section 7 is itself evidence that there is no constitutional prohibition. Furthermore, the prohibition in Section 7 leaves to local courts, state and territorial, as distinguished from courts of the United States, the power to issue such *ex parte* temporary restraining orders.

There is no statutory restriction applicable with respect to the courts of the Territory of Hawaii. In the absence of a statutory restriction, the question of whether or not to issue such an *ex parte* temporary restraining order must in each case be left to the circuit judge. It is a matter of common knowledge that obstructions to ingress and egress and other aspects of illegal picketing have in many recent instances been instituted forthwith upon the commencement of strikes. It is important that the circuit judges have power to deal with such situations, in order that law and order shall not be in suspense and in order that the rights of the public and of the employer and of non-striking employees shall not be interfered with by illegal action on the part of the pickets. There is no reason to believe that the circuit judges have failed or will fail to exercise appropriate judicial discretion in determining whether or not to issue *ex parte* temporary restraining orders.

The appellants criticise the Rice order for not including a finding of great and imminent danger to the state and public (Op. Br. p. 43). The appel-

lants do not disclose, and we do not know, the basis of this criticism. There is no statutory requirement for such a finding and certainly there is no constitutional requirement for such a finding. Furthermore, the general rules of equity do not require such a finding.

## 5. Persons Restrained.

The appellants object to the Rice order on the theory that it restrained too many persons. The particular objection is that it restrained the ILWU which according to the appellants has 100,000 members, employed in the Territory of Hawaii, in the continental United States, Puerto Rico and Canada (Op. Br. pp. 5, 43).

We believe it is common practice for restraining orders and injunctions which regulate picketing to apply their restraints to unions and their officers and members and also to all persons acting in concert with them. Such a restraining order or injunction cannot be effective unless it is applicable to all persons acting in concert with pickets. If it is appropriate to apply restraint to strikers and their pickets, it is appropriate also to apply the same restraints to the union.

Strikes of organized workers are called and are managed and are terminated pursuant to actions by their union. This is the usual situation. It is a matter of common knowledge, of which judicial notice may be taken. In the case of the Hawaii sugar strike of 1946 it was well known that the strike was called and managed by the ILWU. It can only be assumed that this fact was presented to Judge Rice or that Judge Rice took judicial notice thereof.

With respect to this objection of the appellants we refer to the following cases:

*Westinghouse Elec. Corp. vs. United E. R. & M. Workers* (1946), 353 Pa. 446, 46 Atl. 2d. 16, 21, *supra*:

—injunction restrained union and its officers and agents and members and all others acting in concert with them.

*Lisse vs. Local Union No. 31, Cooks, Waiters, Etc.* (1935), 2 Cal. 2d. 312, 41 P. 2d. 314, *supra*:—injunction restrained defendants (including union) and all persons acting for them or either of them in aid or in assistance of them or either of them.

*Bayonne Textile Corp. vs. American Fed. of S. Workers* (1934), 116 N. J. Eq. 147, 172 Atl. 551, 560:—injunction restrained unions and others.

*Drivers Union vs. Meadowmoor Co.* (1941), 371 Ill. 377, 21 N. E. 2d. 308, affirmed 312 U. S. 287, 61 S. Ct. 552, *supra*:—injunction restrained union, estimated by Mr. Justice Black in his dissenting opinion as having approximately 6,000 members (312 U. S. 299, 308, 61 S. Ct. 558, 562).

In the *Bayonne Textile Corp.* case, *supra*, the court pointed out that the management of the strike was in the hands of the union.

We do not believe that this objection of the appellants raises any problem of constitutional law.

## 6. Geographical Extent of Restraints.

The appellants object to the Rice order on the theory that it was too broad geographically (Op. Br. p. 44).

Where a labor injunction case involves a store or restaurant or factory, an injunction or restraining order may be limited geographically to the limited geographic scope of the premises affected. On the other hand, where a labor injunction case involves an agricultural enterprise with several thousand acres of land, an injunction or restraining order may be extended geographically to the extended geographic scope of the premises affected.

It may be noted that in the *Drivers Union* case the Supreme Court upheld an injunction which prohi-



bited the picketing of stores in Chicago where milk distributed by Meadowmoor Dairies, Incorporated, was sold,—thereby recognizing that the geographical extent of an injunction against picketing may be co-extensive with the geographical extent of the picketing (312 U.S. 287, 298, 61 S. Ct. 552, 557).

The appellants also object to the Rice Order on the theory that it too narrowly defined “mass picketing without regard to the nature, size and scope of the industrial conflict” (Op. Br. pp. 44-45). However, under the Rice order there could literally have been hundreds or even thousands of pickets,—all around the plantation premises and on approaches to the plantation premises and even within the plantation premises,—so long as the pickets at each point of ingress and egress were limited to three and pickets in excess of three at other points were in motion and maintained a distance of ten feet except when passing.

The appellants state that the plantation premises include twenty company towns and they refer to *Marsh vs. Alabama*, 326 U.S. 501, 66 S. Ct. 276 (Op. Br. pp. 44, 45). The Rice order did not violate the doctrine of *Marsh vs. Alabama*. Under that doctrine the constitutional guarantees apply in a company town to the same extent as they apply in a public town. There is nothing in the doctrine, however, that gives the constitutional guarantees any greater scope in a company town than they have in a public town. The Rice order did not differentiate between conduct on plantation premises (including company towns) and conduct elsewhere. It permitted picketing in company towns subject only to the same limitations which were applied to picketing elsewhere. Furthermore, under the Rice order assembling in the company towns, for other purposes than to obstruct ingress and egress or than in connection with picketing, was not prohibited.

## 7. Vague and Indeterminate Language.

The appellants object to the Rice order on the theory that it included vague, indeterminate language (Op. Br. p. 45). This objection is also made in paragraph (c) of the statement of appellants pursuant to Rule 19, Subdivision 6 (Tr. p. 379), in which paragraph the appellants claim that the Rice order was void upon the ground that it was vague, ambiguous and confusing.

The appellants do not indicate, in any papers filed with this Court, just wherein the Rice order contained vague, indeterminate language. In order to ascertain what the appellants have in mind in the objection, it is necessary to consider the objection as it was amplified before the District Court, as follows: (1) that the pickets were required to determine at their peril what comprised points of ingress and egress; (2) that the pickets were required to determine whether in any manner any act of theirs had the effect of accomplishing the prohibited act; and (3) that the Rice order was not written in the parlance of the working man on the Island of Kauai, many of whom do not speak English.

We do not believe that the Rice order was void for ambiguity. It was couched in language similar to the language customarily used in injunctions and restraining orders which regulate picketing. In this connection reference is made to the state court cases listed in Part III D of this brief.

Where a labor injunction case involves an agricultural enterprise with several thousand acres of land it is not feasible to list every point of ingress and egress in an injunction or restraining order. Presumably points of ingress and egress are known to the employees, or if not, they can be ascertained. In the second count of the information against them the appellants are charged with picketing in groups

of more than three at points of ingress and egress (Tr. pp. 361-364). The complaint in the instant case contains no indication that the appellants did not know that the points where they are charged with such picketing are points of ingress and egress (Tr. pp. 5-21). Furthermore, any invalidity of any portion of the Rice order, on the basis of indefiniteness or ambiguity, would not raise a problem of constitutional law. It might be pointed out in addition that in the first count of the information against them the appellants are charged with engaging in mass picketing to obstruct ingress and egress,—in violation of paragraph (7) of the Rice order (Tr. pp. 358-361). There is no indefiniteness or ambiguity in paragraph (7).

If a portion of an injunction or restraining order is invalid because of indefiniteness or ambiguity, that fact does not excuse the violation of another portion which is definite and certain. Also, if a defendant or party enjoined is in doubt as to the meaning and intent of an injunction or a restraining order it is his duty to apply to the court for such modification of the language as will remove the indefiniteness and uncertainty. In support of the foregoing rules see 43 C.J.S. 1008-1009 and the following authorities: *Flannery vs. People* (1907), 225 Ill. 62, 80 N.E. 60, 62-63; *Seaboard Air Line Ry. Co. vs. Tampa Southern R. Co.* (1931), 101 Fla. 468, 134 So. 528, 533; *Ex parte Connor* (1940), 240 Ala. 327, 198 So. 850, 853; *Liquor Control Commission vs. McGillis* (1937), 91 Utah 568, 65 P. 2d. 1136, 1140; and *People vs. Sciffill* (1946), 74 Cal. App. 2d. 967, 168 P. 2d. 497, 507.

The Rice order did not require the pickets to determine whether in any manner any act of theirs had the effect of accomplishing prohibited acts. We are particularly interested in paragraph (7). Pa-



ragraph (7) prohibited mass picketing and assembling in crowds,—but only where such action had for its purpose to interfere with ingress or egress. All that the persons massing or congregating had to determine was whether their purpose was to interfere with ingress or egress.

We do not believe that any comment is required with respect to the suggestion made to the District Court that the Rice order should have been translated into the various tongues, including Oriental languages and Filipino dialects, used by laborers on the Island of Kauai.

#### **F. The Contention that the Amended Temporary Restraining Order was Invalid on its Face is Untenable.**

The appellants contend that the Rice order must be judged on its face and on that basis that it is unconstitutional under the principle of the *Thornhill* case (Op. Br. pp. 45-46).

Such contention by the appellants indicates that the issue of constitutional law in the instant appeal is not difficult. An injunction or restraining order relating to picketing must be adjusted to a particular situation in accordance with the settled practice of equity and in an appropriate case may even establish an absolute prohibition against picketing. It necessarily follows that such an injunction or restraining order cannot be held to be invalid on its face.

Such contention by the appellants was amplified when they were before the District Court. The amplified contention is discussed *supra* at pages 19 to 20, in connection with the analysis of the *Drivers Union* case.

In view of the nature of the contention of the appellants, i.e., that the Rice order is unconstitution-

al on its face, there is no need, in disposing of the constitutional issue, to consider the facts set forth in the answer in the instant case or in the exhibits to the answer.

### G. Conclusion.

We therefore conclude that the fourth count of the complaint in the instant case, which deals with the constitutional issue (Tr. pp. 14-20), does not state a claim for relief.

## PART IV.

THE AMENDED TEMPORARY RESTRAINING ORDER WAS NOT IN VIOLATION OF ANY SUBSTANTIVE RIGHTS OF THE APPELLANTS UNDER THE CLAYTON ACT OR THE NORRIS-LAGUARDIA ACT.

### A. Introduction.

The appellants contend that the Rice order was in violation of substantive rights claimed by them under the Clayton Act and the Norris-LaGuardia Act (Tr. pp. 13-14; Op. Br. pp. 32-41; *Wirtz* Op. Br. pp. 74-82, and related matter pp. 55-74 and 82-88, incorporated by reference in Op. Br. p. 10).

The appellants refer to Section 20 of the Clayton Act and Section 4 of the Norris-LaGuardia Act (Op. Br. p. 36; *Wirtz* Op. Br. pp. 75-76).

### B. The Substantive Rights Related to Federal Law Only and Do Not Affect the Law of the Territory of Hawaii.

#### 1. Section 20 of the Clayton Act.

Section 20 of the Clayton Act (29 U.S.C. 52) contains two paragraphs:

The first paragraph provides that, with certain exceptions, no restraining order or injunction shall be granted by any court of the United States in any case

between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of, a dispute concerning terms or conditions of employment. The first paragraph relates to procedural matters only, i.e., it restricts and defines injunctive relief which may be granted by courts of the United States in certain types of cases.

The second paragraph of Section 20 contains the critical provisions, and is as follows (*italics supplied*):

“And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peaceably obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute; or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; *nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.*”

The second paragraph refers to restraining orders and injunctions mentioned in the first paragraph, i.e., restraining orders and injunctions issued by courts of the United States in certain types of cases. The second paragraph provides that no such restraining order or injunction shall prohibit certain specified acts. To this



extent the second paragraph, like the first paragraph, relates to procedural matters only, i.e., it limits the power of courts of the United States to grant injunctive relief in certain types of cases. However the last clause of the second paragraph provides that none of the specified acts shall be considered or held to be violations of any law of the United States. The last clause gives to the specified acts a status of substance, and is the basis of the substantive rights under Section 20.

The motive behind the adoption of Section 20, including the last clause of the second paragraph thereof, was to restrict the issuance of restraining orders and injunctions in suits under the Sherman Act (15 U.S.C. 1-7), and also to amend the substantive provisions of the Sherman Act to provide that the specified acts should not be deemed to be in violation of the Sherman Act. And because of a suggestion made to Congress that certain judges had relied on federal statutory provisions other than the Sherman Act as justifying the issuance of injunctions in labor dispute cases it was provided in the last clause of the second paragraph that none of the specified acts should be considered or held to be in violation of *any* law of the United States,—rather than merely in violation of the Sherman Act.

The legislative history of the last clause is extremely informative on this point. The Clayton Act was first introduced into and passed by the House of Representatives. As the Act went from the House of Representatives to the Senate, the present Section 20 was Section 18. At that time the language of the last clause was as follows:

“nor shall any of the acts specified in this paragraph be considered or held to be unlawful”.

The Senate Committee recommended that the word “unlawful” be eliminated and that the words “violations of the antitrust laws” be substituted. As so amended the language of the last clause would have been as follows:

“nor shall any of the acts specified in this paragraph be considered or held to be violations of the anti-trust laws”.

On the floor of the Senate an amendment was moved and adopted to substitute the words “any law of the United States” for the words “the antitrust laws”. By this amendment the final language was adopted, as follows:

“nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States”.

The debate on the floor of the Senate with respect to the language of the last clause clearly indicates the reasons for the changes. The important point is the reason given for eliminating the original language, to the effect that none of the acts specified in the paragraph should be considered or held to be “unlawful”. It was pointed out that under the original language it might be held that none of the specified acts could be proscribed by state common law or state statutory law. It was further pointed out that the first of the specified acts was “terminating any relation of employment”, and that if the termination of any relation of employment was declared by Congress to be not unlawful generally, then it might be impossible to an employee to obtain redress in a state court in case an employer violated a contract of employment by discharging the employee contrary to the terms of the contract. The discussion and the changes made in the language of the last clause, establish that the purpose of the last clause was merely to modify the substantive provisions of the Sherman Act (and of any other federal legislation that might otherwise be interpreted as prohibiting any of the specified acts) so that the provisions of the Sherman Act (and of any such other federal legislation) should not be deemed to prohibit any of the specified acts. See Congressional Record, 63rd Congress, 2nd Session, Vol. 51, Part 14, pages 14365-143367.

The relationship of the substantive aspects of Section 20 of the Clayton Act to the general provisions of the Sherman Act is pointed out by the Supreme Court in *United States vs. Hutcheson*, 312 U.S. 219, 229-230, and 236-237, 61 S. Ct. 463, 465, and 468, in the following language:

"Section 20 of the Act, which is set out in the margin in full, withdrew from the general interdict of the Sherman Law specifically enumerated practices of labor unions by prohibiting injunctions against them—since the use of the injunction had been the major source of dissatisfaction—and also relieved such practices of all illegal taint by the catch-all provision, 'nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.'

\* \* \*

"It was precisely in order to minimize the difficulties to which the general language of the Sherman Law in its application to workers had given rise, that Congress cut through all the tangled verbalisms and enumerated concretely the types of activities which had become familiar incidents of union procedure."

Numerous decisions hold that Section 20 does not prohibit injunctions in labor dispute cases in state courts and does not in any way modify substantive state law. In *Drivers Union vs. Meadowmoor Co.* (1941), 312 U.S. 287, 61 S. Ct. 552, *supra*, the Supreme Court recognized the right of a state court to issue an injunction in a labor dispute case. The same right has been recognized in many state court cases, some of which are cited *supra*, in Part III D of this brief.

The situation must be the same in a territory as in a state. When Congress provided that the Sherman Act (and any other federal legislation) should not be deemed to prohibit "terminating any relation of employment", to take one example, it no more intended to eliminate the common law or statutory law of a territory with respect to rights and remedies for breach of contract than it in-



tended to eliminate the common law or statutory law of a state with respect to similar rights and remedies.

## 2. Section 4 of the Norris-LaGuardia Act.

Section 4 of the Norris-LaGuardia Act (29 U.S.C. 104) purports by its language to relate to procedural matters only, i.e., it restricts and defines injunctive relief which may be granted by courts of the United States in cases involving or growing out of labor disputes.

The appellants rely upon the specified acts listed in paragraphs (e) and (f) of Section 4. Said paragraphs are as follows:

“(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

“(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;”.

The substantive rights under Section 4 exist by reason of the opinion of the Supreme Court in the *Hutcheson* case. The opinion states that where Congress expresses a national policy, as by the enactment of the Norris-LaGuardia Act, in terms of the imposition of restrictions on the power of courts of the United States to issue restraining orders and injunctions in labor dispute cases, the national policy should be recognized in criminal cases as well as in equity cases (312 U. S. 219, 234-235, 61 S. Ct. 463, 467). The opinion also states that whether trade union conduct constitutes a violation of the Sherman Act is to be determined only by reading the Sherman Act and Section 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct (312 U. S. 219, 231, 61 S. Ct. 463, 466). If, as this statement indicates, the Norris-LaGuardia Act, including Section 4, provides exceptions

to the general language of the Sherman Act, the exceptions must be of substantive significance and not merely as of procedural significance in equity cases. In addition the opinion states that immunized trade union activities as redefined in the Norris-LaGuardia Act are removed by Section 20 of the Clayton Act from the taint of being a "violation of any law of the United States", including the Sherman Act (312 U. S. 219, 236, 61 S. Ct. 463, 468).

It would appear therefore that the specified acts listed in Section 4 of the Norris-LaGuardia Act are in *pari materia* with the specified acts listed in Section 20 of the Clayton Act,—i.e., both sets of specified acts have substantive significance as not being in violation of any law of the United States.

### **3. The Effect on the Sherman Act, with Particular Reference to the Effect within a Territory.**

The Sherman Act in general language prohibits combinations and conspiracies in restraint of trade or commerce. Section 1 of the Sherman Act (15 U.S.C. 1) prohibits combinations and conspiracies in restraint of trade or commerce among the several states or with foreign nations. Section 3 of the Sherman Act (15 U.S.C. 3) prohibits combinations and conspiracies in restraint of local trade or commerce within a territory.

Prior to the enactment of Section 20 of the Clayton Act and of Section 4 of the Norris-LaGuardia Act various types of trade union conduct were held to be in violation of the Sherman Act, i.e., to constitute combinations or conspiracies in restraint of trade or commerce. The purpose of the substantive aspects of Section 20 of the Clayton Act was to amend the Sherman Act so that types of labor conduct covered by the specified acts listed in Section 20 would no longer be held to be in violation of the Sherman Act. Similarly the purpose of the substantive aspects of Section 4 of the Norris-LaGuardia Act was to amend the Sherman Act so that types of labor

conduct covered by the specified acts listed in Section 4 would no longer be held to be in violation of the Sherman Act. In each case the types of labor conduct no longer constitute illegal combinations or conspiracies in restraint of trade or commerce. This is true whether the trade or commerce is interstate or foreign trade or commerce or is local trade or commerce in a territory.

We are therefore dealing with a federal law, the Sherman Act, and its exceptions. An exception to a federal law limits the impact of that federal law, but it does not affect local law whether state or territorial.

Where a federal law applies in the Territory of Hawaii any exceptions to that federal law limit the impact of that federal law in its application in the Territory,—but such exceptions do not restrict the power of the Territory with respect to matters of local law. More particularly, the exceptions to the Sherman Act created by Section 20 of the Clayton Act and Section 4 of the Norris-LaGuardia Act limit the impact of Section 3 of the Sherman Act in its application in the Territory of Hawaii,—i.e., none of the specified acts constitute illegal combinations or conspiracies in restraint of local trade or commerce in the Territory. (Also, in view of the general language of the last clause of Section 20, such exceptions also limit the impact in the Territory of Hawaii of any other federal legislation that might otherwise be interpreted as prohibiting any of the specified acts.) However such exceptions do not affect, and do not purport to affect, the local law of the Territory<sup>1</sup> on matters relating to the maintenance of peace and order, and having no relation to the antitrust laws.

The prosecution which the appellants face is not for alleged violations of the Sherman Act. If the appellants

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<sup>1</sup>The term "local law of the Territory" is used to describe all local law, whether existing by enactment of the territorial legislature or whether embodied in common law or other rights enforced by the courts of the Territory.



faced prosecution for alleged violations of the Sherman Act then it would be appropriate to consider the amended scope of the Sherman Act, as limited by Section 20 of the Clayton Act and Section 4 of the Norris-LaGuardia Act. The appellants however face prosecution for violating local law of the Territory, in the shape of a restraining order which had for its purpose to maintain peace and order and protect the co-relative rights of all persons concerned in a labor dispute. In such a prosecution neither the original scope of the Sherman Act nor the amended scope thereof can have any relevancy whatsoever.

We will attempt, with reference to three examples, to illustrate our position with respect to the effect on the Sherman Act of the exceptions to the Sherman Act established by Section 20 of the Clayton Act and Section 4 of the Norris-LaGuardia Act. For the purposes of these examples we will assume that paragraphs (e) and (f) of Section 4 provide in effect that mass picketing to obstruct ingress and egress does not constitute a violation of the Sherman Act (or of any other federal legislation).

Example 1: If such mass picketing is indulged in in New Jersey, with respect to an enterprise which is engaged in interstate commerce, and such mass picketing interferes with interstate commerce, paragraphs (e) and (f) prohibit such mass picketing from being held to be a combination or conspiracy in restraint of interstate commerce.

Example 2: If such mass picketing is indulged in in Hawaii, with respect to an enterprise which is engaged in interstate commerce, and such mass picketing interferes with such interstate commerce, paragraphs (e) and (f) prohibit such mass picketing from being held to be a combination or conspiracy in restraint of interstate commerce.

Example 3: If such mass picketing is indulged in in Hawaii with respect to an enterprise which is engaged only in local commerce in the Territory, and such mass picketing interferes with such local commerce, paragraphs (e) and (f) prohibit such mass picketing from being held to be a combination or conspiracy in restraint of local commerce in the Territory.

But the fact that mass picketing in New Jersey to obstruct ingress and egress is not in violation of the Sherman Act as applied to interstate commerce does not mean that such mass picketing is not in violation of the local law of New Jersey. See *Isolantite vs. United Elcc., Radio and Mach. Workers* (1942), 132 N. J. Eq. 613, 29 Atl. 2d. 183, and *Western Electric Co. vs. Western Electric Emp. Ass'n.* (1946), 137 N. J. Eq. 489, 45 Atl. 2d. 695. Similarly the fact that mass picketing in Hawaii to obstruct ingress and egress is not in violation of the Sherman Act, as applied to interstate commerce, or as applied to local commerce in the Territory, does not mean that such mass picketing is not in violation of the local law of the Territory.

The fact that it is expressly provided that certain specified acts are not in violation of any law of the United States, including the Sherman Act, does not mean that a state or a territory cannot prohibit such specified acts. Embezzlement, except from agencies of the federal government and possibly under other special circumstances, is not in violation of any law of the United States. It is, however, a crime under Chapter 255 of the Revised Laws of Hawaii 1945. Similar situations exist with respect to most of the common felonies and misdemeanors. The same situation should be held to exist with respect to the non-statutory local law, enforced by courts of equity in pursuance to their general jurisdiction, for the purpose of maintaining peace and order.

The Sherman Act might very well have been interpreted by the courts as not being applicable to labor

combinations. (In fact the purpose of Section 20 of the Clayton Act, and subsequently the purpose of the Norris-LaGuardia Act, were to correct what were believed to be errors in the interpretation of the Sherman Act by the courts.) If the Sherman Act had been interpreted as above suggested then there would have been no reason for the express provisions of Section 20 of the Clayton Act or of Section 4 of the Norris-LaGuardia Act. In such case the federal law, i.e., the meaning of the Sherman Act, would be the same as it is now. But in such case certainly it would never be urged that the regulation of conduct in labor disputes is beyond the control of state or territorial power merely because such regulation is not covered by the Sherman Act. The situation, so far as state or territorial authority is concerned, cannot be different when the interpretation of the Sherman Act is corrected by the provisions of Section 20 and Section 4 than the situation would be if the Sherman Act had always been interpreted as not being applicable to labor combinations and had not required correction.

The appellants contend that Section 20 and Section 4 not only operate to amend the Sherman Act but also state the substantive law of the Territory of Hawaii on all matters whatsoever, including matters having no connection with the Sherman Act.

The appellants refer to the fact that Congress, in the enactment of the Sherman Act, the Clayton Act, and the Norris-LaGuardia Act, acted under its "plenary power" to legislate for the territories, as well as under its power to regulate interstate and foreign commerce (Op. Br. p. 34; *Wirtz* Op. Br. pp. 72-74). It is true that Congress has plenary power, subject to constitutional limitations, to legislate for the territories. It is also true that Congress acted under such plenary power in the Sherman Act, in prohibiting combinations or conspiracies in restraint of local trade or commerce in the territories. It is also true that Congress acted under such plenary power in establishing the exceptions to the



Sherman Act which are provided for in Section 20 and Section 4.

But in the enactment of the Sherman Act Congress did not exercise the full scope of its plenary power to legislate for the territories. It exercised such plenary power only with respect to the subject matter of the Sherman Act, i.e., combinations or conspiracies in restraint of trade or commerce. It did not act, and did not purport to act, with respect to the local law of any territory on matters relating to the maintenance of peace and order and having no relation to combinations or conspiracies in restraint of trade or commerce.

Similarly, in so far as Congress amended Section 3 of the Sherman Act by the enactment of Section 20 of the Clayton Act and Section 4 of the Norris-LaGuardia Act, Congress did not exercise the full scope of its plenary power to legislate for the territories. It exercised such plenary power only with respect to the subject matter of the Sherman Act, i.e., combinations or conspiracies in restraint of trade or commerce. Section 3 of the Sherman Act prohibits combinations or conspiracies in restraint of local trade or commerce in the territories generally. Under Section 20 of the Clayton Act and Section 4 of the Norris-LaGuardia Act, certain specified acts, even though they might otherwise constitute combinations or conspiracies in restraint of such trade or commerce, are not violations of Section 3 of the Sherman Act. Congress, by providing exceptions to the application of Section 3 of the Sherman Act, cannot be deemed to have had any intent to do anything else. More specifically, Congress cannot be deemed to have had any intent to take away from the Territory of Hawaii its normal police powers with respect to matters which are not related to combinations or conspiracies in restraint of trade or commerce.

Also the appellants rely on a reference in the *Hutchinson* opinion to "allowable conduct" (312 U.S. 219, 236,

61 S. Ct. 463, 468) in support of their contention that the specified acts state the substantive law of the Territory of Hawaii on all matters whatsoever (Op. Br. pp. 33, 36; *Hirtz* Op. Br. p. 75). The reference in the *Hutcherson* opinion was included within the following language (italics supplied) :

“The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light § 20 removes all such *allowable conduct* from the taint of being a ‘violation of any law of the United States,’ including the Sherman Law.”

It is clear that the Supreme Court, in referring to allowable conduct, meant conduct which was not in violation of any federal legislation, including the Sherman Act.

That the substantive provisions of Section 20 of the Clayton Act operate only in the field of federal law is assumed by the Supreme Court. In *Allen-Bradley Co. vs. Union* (1945), 325 U. S. 797, 807, 65 S. Ct. 1533, 1538-1539, the Supreme Court referred to the specific acts listed in Section 20 of the Clayton Act as having been declared by Section 20 “not to be violations of federal law”.

It is a necessary conclusion therefore that, although Section 20 and Section 4 are applicable within the Territory of Hawaii as limitations on the effect in the Territory of the Sherman Act (and of any other federal legislation that might otherwise be interpreted as prohibiting any of the specified acts) they are not applicable as limiting the territorial government, including the territorial courts, with respect to matters of local law.

**C. The Term “law of the United States”, as Used in Section 20 of the Clayton Act and in the Decision in the *Hutcherson* case, has a Well Defined Meaning, Recognized by the Courts and by Congress, Which does not Include the Law of a Territory.**

## 1. Decisions Defining "law of the United States".

In *Maxwell vs. Federal Gold & Copper Co.* (1907), 155 F. 110, 112, the Circuit Court of Appeals for the Eighth Circuit stated:

"But the laws of the territories are not laws of the United States".

The issue under discussion was whether the fact that the defendant was a corporation organized under a law of the Territory of Arizona gave jurisdiction to the federal courts. Jurisdiction was claimed on the theory that the corporation was organized under a law of the United States. The Court held the claim to be untenable,—because a law of the Territory of Arizona was not a law of the United States. The holding was despite the general rule, recognized by the Court, that actions brought against corporations organized pursuant to acts of Congress do arise under laws of the United States. See *Pacific Railroad Removal Cases* (1884), 115 U. S. 1, 11, 5 S. Ct. 1113, 1118; *Texas & Pacific Railway Co. vs. Cox* (1892), 145 U. S. 593, 603, 12 S. Ct. 905, 908; and *United States Freehold Land & Emigration Co. vs. Gallegos* (1898), 89 F. 769.

In *Ex parte Moran* (1906), 144 F. 594, 603 the Circuit Court of Appeals for the Eighth Circuit stated:

"The laws of the territory are not laws of the United States,\* \* \*".

The issue under discussion was whether a prisoner could be discharged by use of the writ of habeas corpus. Congress had provided various grounds pursuant to which the writ might be issued by federal courts. The only ground possibly applicable was that the prisoner was "in custody in violation of the Constitution or of a law or treaty of the United States." The claim of the petitioner was that he was in custody in violation of a statute of the Territory of Oklahoma. The Court discharged the writ,—because a law of the Territory of Oklahoma was not a law of the United States.



In *Am. Security Co. vs. Dist. of Columbia* (1912), 224 U. S. 491, 32 S. Ct. 553, and in *Washington & Mt. Vernon Ry. vs. Downey* (1915), 236 U. S. 190, 35 S. Ct. 406, the Supreme Court held that an act of Congress enacted as a local law relating to the District of Columbia was not a law of the United States.

In *Puerto Rico vs. Rubert Co.* (1940), 309 U. S. 543, 60 S. Ct. 699, the Supreme Court held that Section 39 of the Organic Act of Puerto Rico (48 U. S. C. 752) was not one of the laws of the United States, within the meaning of Section 256 of the Judicial Code (28 U. S. C. 371). Section 39 of the Organic Act of Puerto Rico restricted every corporation authorized to engage in agriculture to the ownership and control of not to exceed 500 acres of land. Section 256 of the Judicial Code vested exclusive jurisdiction in courts of the United States of all suits for penalties and forfeitures incurred under the laws of the United States. The Court held that, notwithstanding Section 256 of the Judicial Code, the Puerto Rican legislature could give to a Puerto Rican territorial court jurisdiction of a *quo warranto* proceeding against a corporation for violation of Section 39 of the Organic Act.

The foregoing cases establish, first, that a law of the Territory is not a law of the United States, and second, that an act of Congress enacted for the District of Columbia or for a territory is not a law of the United States. It follows that when Congress provides that certain specified acts are not to be considered or held to be violations of any law of the United States, it does not mean that the specified acts operate as restrictions on a territorial government, including its courts, with respect to normal matters of local law.

## 2. Congressional Recognition of Distinction Between "law of the United States" and Local Laws of a Territory.

In both the Sherman Act and the Clayton Act Congress recognized the distinction between a law of the United States and a law of a territory.

In the Sherman Act this recognition appears in Section 8 (15 U.S.C. 7) which contains the following definition of the term "person" (*italics supplied*):

"The word 'person', or 'persons', wherever used in this Act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, *the laws of any of the Territories*, the laws of any State, or the laws of any foreign country."

In the Clayton Act this recognition appears in Section 1 (15 U.S.C. 12) which contains the following definition of the term "person":

"The word 'person' or 'persons', wherever used in this Act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

The recognition by Congress, in the Sherman Act and in the Clayton Act, of the distinction between a law of the United States and a law of the Territory, establishes conclusively that it was not the intent of Congress, by the last clause of Section 20 of the Clayton Act, to affect the local law of a territory, whether statutory or nonstatutory, having to do with the maintenance of the peace and order, and having no relation to the anti-trust laws.

#### **D. A Limitation upon the Normal Police Powers of the Territory of Hawaii is not to be Implied.**

The Hawaiian Organic Act (48 U.S.C. 491 et seq.) gives to the Territory of Hawaii broad powers of local self-government. In *Puerto Rico vs. Shell Co.* (1937), 302 U. S. 253, 260-263, 58 S. Ct. 167, 170-172, the Supreme Court had under consideration provisions of the Puerto Rican Organic Act (48 U.S.C. 731 et seq.) similar to those of the Hawaiian Organic Act. The Supreme Court stated that the grant of legislative power to the govern-

ment of Puerto Rico "is as broad and comprehensive as language could make it", and that the aim of the Puerto Rican Organic Act "was to give Puerto Rico full power of local self-determination, with an autonomy similar to that of the states and incorporated territories."

We recognize of course that Congress can and does legislate with respect to the local law of the territories. Congress has in various instances legislated with respect to local trade or commerce in the territories at the same time as and by the same acts by which it has legislated with respect to interstate and foreign commerce. The Sherman Act is one instance.

But where Congress has legislated with respect to the local law of the territories, it has done so expressly. In the Sherman Act, for example, the prohibition against combinations and conspiracies in restraint of local trade or commerce within a territory is expressly provided for in Section 3.

It is our position that an intent on the part of Congress to limit the normal police powers of a territory is not to be implied from congressional language dealing with another subject matter. As above shown the purpose of the last clause of Section 20 of the Clayton Act was to make substantive amendments to the Sherman Act (and to any other federal legislation that might be pertinent). The last clause does not expressly limit the normal police powers of the Territory of Hawaii. There is no basis for implying any such limitation.

In this connection reference is made to *Inter-Island Co. vs. Hawaii* (1938), 305 U. S. 306, 312, 59 S. Ct. 202, 205, the opinion of which contains the following:

"The Shipping Act invested the Shipping Board with authority over some of these matters. But no language in that Act indicates that Congress intended to withdraw all of the territorial Commission's jurisdiction over territorial water carriers.



While Congress had complete power to repeal the entire territorial Public Utilities Act, 'an intention to supersede the local law [of a Territory] is not to be presumed, unless clearly expressed.' "

**E. Assuming that the Substantive Rights Affect the Local Law of the Territory of Hawaii, the Substantive Rights were not Violated by the Rice Order.**

The thesis to be presented in this part of our brief is that even if the substantive provisions of Section 20 of the Clayton Act and Section 4 of the Norris-LaGuardia Act operate to modify the local substantive law of the Territory, nevertheless the Rice order was properly issued and was not in violation of such substantive rights. It is our position that the substantive provisions of Section 20 and Section 4, in so far as they are pertinent to the problem of picketing, give no greater rights than the constitutional right of "freedom of speech" and the constitutional right "peaceably to assemble".

In this discussion reference will be made particularly to the provisions relied on by the appellants, to wit, paragraphs (e) and (f) of Section 4, as follows:

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

"(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;"

In order that these provisions may be considered in proper perspective we quote also the pertinent provisions of the First Amendment, as follows:

"Congress shall make no law \* \* \* abridging the freedom of speech, \* \* \* or the right of the people peaceably to assemble, \* \* \*."

Paragraph (e) relates to "Giving publicity to the existence of, or the facts involved in, any labor dispute

\*\*\*\* This is no more nor less than one aspect of "freedom of speech" guaranteed by the First Amendment. Paragraph (e) is more restrictive than the First Amendment because paragraph (e) relates to "giving publicity" only in connection with labor disputes; whereas the First Amendment guarantees the right of "freedom of speech" in all matters.

Subsequent language of paragraph (e) lists means for "giving publicity", i.e., "by advertising, speaking, patrolling, or by any other method not involving fraud or violence". However such subsequent language all relates to the matter of "giving publicity". In other words, if any group of persons patrol or take other action for a purpose other than to give publicity, as for example, to obstruct ingress or egress, they do not come within the scope of paragraph (e). Obstructing ingress or egress is a different and separate matter from "giving publicity". The subsequent language of paragraph (e) might conceivably justify mass picketing in a case where the mass picketing has for its purpose to give publicity but it certainly does not justify mass picketing where the purpose of the mass picketing is to obstruct ingress or egress.

Paragraph (f) relates to "assembling peaceably to act or to organize to act in promotion of their interest in a labor dispute;". This is no more than one aspect of the right "peaceably to assemble" guaranteed by the First Amendment. There can be no possible basis for arguing that the term "assembling peaceably" as used in paragraph (f) means any more than the term "peaceably to assemble" as used in the First Amendment. Paragraph (f) is more restrictive than the First Amendment because paragraph (f) relates to "assembling peaceably" only in relation to labor disputes; whereas the First Amendment guarantees the right "peaceably to assemble" in all matters.

It has already been shown that the constitutional

rights of "freedom of speech" and "peaceably to assemble" are not absolute rights, i.e., they can be forfeited if abused and they can be regulated so as not to interfere with the co-relative rights of others. Certainly the statutory rights under paragraph (e) and paragraph (f) are no more absolute than the constitutional rights.

It follows that the regulations of picketing which are permitted notwithstanding the constitutional rights of "freedom of speech" and "peaceably to assemble" are also permitted notwithstanding the provisions of paragraph (e) and paragraph (f).

It has more specifically been shown that the constitutional rights of "freedom of speech" and "peaceably to assemble" do not give the right to engage in mass picketing to obstruct ingress or egress. Certainly then the provisions of paragraphs (e) and (f) do not give the right to engage in mass picketing to obstruct ingress or egress.

It has further been shown that the same constitutional rights do not prohibit limiting the numbers of pickets where such action is necessary in order to eliminate obstructions to ingress or egress or otherwise to maintain peace and order. Certainly then the provisions of paragraphs (e) and (f) also do not prohibit the limiting of the numbers of pickets under the same circumstances.

Various states have so-called "Little Norris-LaGuardia Acts", containing provisions identical with or similar to the provisions of paragraphs (e) and (f). The decisions under such legislation hold that, notwithstanding such provisions, mass picketing can be regulated or prohibited and the numbers of pickets may be limited. We refer to the decisions in the following cases (which are discussed more fully in Part III D of this brief): NEW JERSEY: L. 1941, c. 15, § 1, R. S. Cum. Supp. 2: 29-77.1,—*Isolantite vs. United Elec., Radio and Mach. Workers* (1942), 132 N. J. Eq. 613, 29 Atl. 2d. 183, *Western Electric Co. vs. Western Electric Emp. Ass'n.* (1946), 137 N. J.



Eq. 489, 45 Atl. 2d. 695; NEW YORK: L. 1935, c. 477, Civil Practice Act, § 876-a (f) (5),—*Goldfinger vs. Feintuch* (1937), 276 N. Y. 281, 11 N. E. 2d. 910, *General Electric Company vs. Andrew Peterson, et al.*, (1946), 61 N. Y. Supp. 2d. 813; PENNSYLVANIA: Purdon's Statutes (1937), Title 43, Sec. 206(a)—206(q),—*Westinghouse Elec. Corp. vs. United E. R. & M. Workers* (1946), 353 Pa. 446, 46 Atl. 2d. 16; WASHINGTON: L. 1933 Exsc. 7, Pierce's Code 1939, § 3462-24,—*Weyerhaeuser Timber Co. vs. Everett Dist. Council* (1941), 11 Wash. 2d. 503, 119 P. 2d. 643.

Appellants rely on *Wilson & Co. vs. Birl* (1939), 27 F. Supp. 915, 105 F. 2d. 948 (Op. Br. pp. 38-40).

In the *Birl* case it was held that a court of the United States could not enjoin mass picketing in a labor dispute, by reason of the provisions of Section 4 of the Norris-LaGuardia Act,—irrespective of whether mass picketing was illegal in Pennsylvania, where the case arose. We do not believe that the decision in the *Birl* case is applicable in the present case, for reasons stated below.

In the first place both the District Court and the Circuit Court of Appeals in the *Birl* case treated Section 4 as relating solely to the jurisdiction of courts of the United States and did not consider it as setting forth any substantive provisions of federal law. The opinions of both courts indicate that both courts were most concerned with the introductory portion of Section 4 which provides that "No court of the United States shall have jurisdiction \* \* \*" etc.

In this connection it should be pointed out that the problem is considerably more complicated when one deals with substantive provisions than it is when one deals merely with procedural restrictions on courts of the United States. The provisions of the First Amendment which guarantee the right of "freedom of speech" and the right "peaceably to assemble" are substantive pro-

visions. As shown above the rights guaranteed by such substantive provisions are not absolute and also such rights do not prevent restrictions on picketing when picketing is used for purposes unrelated to the guaranteed rights. The problems of interpretation which arise with respect to the freedoms guaranteed by the First Amendment also arise with respect to the language of Section 4, —where such language is taken as establishing substantive provisions of federal law rather than as merely setting forth limitations on the jurisdiction of courts of the United States.

In the second place both the District Court and the Circuit Court of Appeals in the *Birl* case dealt with mass picketing as a means of “giving publicity” and “assembling peaceably”. It does not appear from the opinions in the *Birl* case that there was any evidence that mass picketing was used as a means of obstructing ingress or egress. Where mass picketing is used as a means of obstructing ingress or egress then it does not constitute “giving publicity” under paragraph (e) or “assembling peaceably” under paragraph (f). On the other hand, in the instant appeal the Rice order does not prohibit mass picketing as a method of “giving publicity” or as a method of “assembling peaceably”, but prohibits mass picketing only where it has for its purpose to obstruct ingress or egress.

Furthermore if the decisions in the *Birl* case are taken to mean that substantive rights under Section 4 include the right to engage in mass picketing whatever its purpose, then such decisions are contrary to statements of the United States Supreme Court with reference to the scope of the First Amendment.

The appellants also rely on *Carter vs. Herrin Motor Freight Lines* (1942), 131 F. 2d. 557 (Op. Br. pp. 40-41). The opinion in this case contains passing references to Section 4 of the Norris-LaGuardia Act but the decision is not based on that Section. The opinion does not dis-

tinguish between "giving publicity" and "assembling peaceably" on the one hand, and such acts as obstructing ingress or egress on the other hand. The decision is based on Sections 7 and 8 of the Norris-LaGuardia Act (29 U.S.C. 107 and 108). The plaintiff, who was attempting to obtain injunctive relief in a labor dispute in a court of the United States, had not complied with the requirements of Section 7 because it had not shown that the public officers charge with the duty to protect its property were unwilling or unable to furnish adequate protection. Also the plaintiff had not complied with the requirements of Section 8 because it had failed to make every reasonable effort to settle the dispute by negotiation or mediation or arbitration.

We have dealt in detail only with paragraphs (e) and (f) of Section 4 of the Norris-LaGuardia Act. However the same principles apply to all of the other specified acts listed in Section 4 and to the specified acts listed in Section 20 of the Clayton Act. All of such specified acts, in so far as they have any pertinence to the question of picketing, are comparable to the constitutional right of "freedom of speech" and to the constitutional right "peaceably to assemble".

One might wonder what was the need for Section 20 of the Clayton Act and Section 4 of the Norris-LaGuardia Act if such sections merely restate constitutional rights. The answer is that as shown in Part III C of this brief, the constitutional basis for picketing was not given judicial recognition until 1937 and thereafter, subsequent to the enactment of both the Clayton Act and the Norris-LaGuardia Act.

#### F. Conclusion.

We therefore conclude that the third count of the complaint in the instant case, dealing with the issue of substantive rights (Tr. pp. 13-14), does not state a claim for relief.



## PART V.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII SHOULD NOT INTERFERE WITH THE PENDING PROCEEDINGS IN THE CIRCUIT COURT OF THE TERRITORY OF HAWAII.

**A. The Relationships Between the District Court for the District of Hawaii and the Courts of the Territory of Hawaii are the Same as the Relationships Between the Constitutional District Courts and the Courts of the Several States.**

Section 86(c) of the Hawaiian Organic Act (48 U.S.C. 642) provides that the United States District Court for the District of Hawaii "shall have the jurisdiction of district courts of the United States, \* \* \*."

Section 86(d) of the Hawaiian Organic Act (48 U.S.C. 645) contains the following:

"The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."

A result of Section 86(c) is that if a constitutional district court is precluded by statute or rule of law from interfering in state court proceedings similar to the proceedings in which the Rice order was issued, the District Court for the District of Hawaii is precluded from interfering with the territorial court proceedings. Section 86(d) has the same effect.<sup>1</sup>

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<sup>1</sup>The distinction should be noted between (1) the relationship of district courts (including constitutional district courts and the District Court of the Territory) and state and territorial courts and (2) the jurisdiction of district courts (including constitutional district courts and the District Court of the Territory) with respect to

This Court has recognized that the Organic Act places the courts of the Territory of Hawaii in a relatively similar position to the federal judicial system as are the state courts. See *Wilder's S. S. Co. vs. Hind* (1901), 108 F. 113, 115-116, affirmed 183 U. S. 545, 22 S. Ct. 225, and *Yeung vs. Territory of Hawaii*, 132 F. 2d. 374, 378.

matters of territorial law as distinguished from matters of state law. Certain provisions of the Judicial Code give to the constitutional district courts specified powers with respect to specified matters of state action, without mentioning territorial action. If the term "State" as used in these provisions is interpreted as not including a territory, then the constitutional district courts do not have jurisdiction with respect to territorial action as to these matters, and also the District Court for the Territory of Hawaii, having the same jurisdiction as the constitutional district courts, does not have jurisdiction with respect to territorial action on these matters.

One of these provisions is in Section 266 of the Judicial Code (28 U.S.C. 380, revised in new Judicial Code and Judiciary, 28 U.S.C. 2283) which provides that a district court shall not enjoin the enforcement of any statute of a state on the ground of unconstitutionality unless the matter shall be heard and determined by a three-judge court. The problem of whether Section 266 applies with respect to a territorial statute as well as with respect to a state statute depends on whether the term "State", as used in Section 266, does or does not include a territory. This problem is involved in the *Chinese Language School case*, *Mo Hock Ke Lok Po vs. Stainback*, 74 F. Supp. 852, 858-865, which is now before the Supreme Court.

Another of these provisions is in Section 24(14) of the Judicial Code (28 U.S.C. 41(14), revised in new Judicial Code and Judiciary, 28 U.S.C. 1343(3)), which gives to the district courts original jurisdiction over actions brought to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any state, of any right, privilege or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

**B. Interference by a Constitutional District Court with Similar Proceedings in a State Court is Prohibited by Section 265 of the Judicial Code.**

Section 265 of the Judicial Code (28 U.S.C. 379) provides as follows<sup>2</sup>:

The problem of whether Section 24(14) applies with respect to a law, statute, ordinance, regulation, custom or usage of a territory, as well as of a state, depends on whether the term "State", as used in Section 24(14), does or does not include a territory.

When the instant case was before the District Court counsel for the appellants (plaintiffs below) and the appellees (defendants below) agreed that the term "State", as used in Section 24(14), included a territory; and this agreement was accepted and approved by Judge McLaughlin (74 F. Supp. 865, 868). However, in the *Chinese Language School* case the three-judge court considered the problem *sua sponte* and came to the conclusion that the term "State", as used in Section 24(14), does not include a territory. In discussing the various paragraphs of Section 28 the court stated (74 F. Supp. 852, 853):

"No one of these gives the district courts jurisdiction of a deprivation of a right created by a *territorial* law, though paragraph (14) gives such jurisdiction to such a deprivation by a state law. It thus seems that Congress intends that a territorial invasion of the right in controversy involving less than \$3,000 should have its litigation in the territorial courts."

In the instant case, if Section 24(14) does not give jurisdiction then the district court had no jurisdiction because the complaint does not include any allegation of jurisdictional amount (Tr. pp. 5-22).

<sup>2</sup>References are made to the Judicial Code prior to the enactment of the new Judicial Code and Judiciary effective September 1, 1948. Section 2283 of the new Judicial Code and Judiciary (28 U.S.C. 2283) is as follows:

"A court of the United States may not grant an injunction to stay proceedings in State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment."



“The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.”

There are a few, but very few, statutory exceptions to the provisions of Section 265. There is also one, but only one, judge-made exception,—which latter permits a federal court to restrain state court proceedings seeking to interfere with property in custody of the federal court. The statutory exceptions existing in 1941 and the judge-made exception are listed in *Toucey vs. N. Y. Life Ins. Co.* (1941), 314 U. S. 118, 62 S. Ct. 139. *Bowles vs. Willingham* (1944), 321 U. S. 503, 64 S. Ct. 641, states that an additional statutory exception was created in 1942.

The exceptions mentioned in the *Toucey* case and in the *Bowles* case are the only exceptions. This appears from the following language in the *Bowles* case (321 U. S. 503, 510, 64 S. Ct. 641, 645) :

“We recently had occasion to consider the history of § 265 and the exceptions which have been engrafted on it. *Toucey v. New York Life Ins. Co.*, 314 U. S. 118. In that case we listed the few Acts of Congress passed since its first enactment in 1793 which operate as implied legislative amendments to it. 314 U. S. pp. 132-134. There should now be added to that list the exception created by the Emergency Price Control Act of 1942.”

Furthermore, the opinion in the *Toucey* case indicates that the present judge-made exception may be justified on the basis that it was in existence prior to the original enactment in 1793 of the forerunner of Section 265, but that the existence of one judge-made exception is no justification for making another (314 U. S. 118, 139, 62 S. Ct. 139, 147). The creation of any additional judge-made exceptions would be in violation of the language and would tend to defeat the intent of Section 265.

For the purpose of the instant appeal the important point is that the Civil Rights Act (8 U.S.C. 43) is not an exception to Section 265. There is very good reason why the Civil Rights Act is not an exception. The Civil Rights Act protects all rights, privileges or immunities secured by the Constitution and laws of the United States. If the Civil Rights Act were an exception, the exception would necessarily be as broad as the rule and would in effect eliminate Section 265.

The cases below listed in this paragraph were federal court suits to stay state court proceedings on the ground that the state court proceedings were in violation of rights of the plaintiffs under federal laws. In other words, such cases involved civil rights under the laws of the United States. In each of such cases the court held that Section 265 precluded relief. The cases are: *Hemsley vs. Myers* (1891), 45 Fed. 283; *Ritholz vs. North Carolina State Board, Etc.* (1937), 18 F. Supp. 409, 412; *Davega-City Radio vs. Boland* (1938), 23 F. Supp. 969, 970; *Mickey vs. Kansas City, Mo.* (1942), 43 F. Supp. 739, 742; *Atlantic Fishermen's Union vs. Barnes* (1947), 71 F. Supp. 927, 928; and *Babcock vs. Noh* (1938), 99 F. 2d. 738, 740.

Section 265 applies only with respect to state court proceedings which have already been commenced. Under certain circumstances threatened prosecution in violation of constitutional rights or federal statutory rights may be enjoined. The distinction between a pending state court proceeding, and a threatened state court proceeding, was recognized by this court in *Babcock vs. Noh*, 99 F. 2d. 738, 739-740, *supra*. See also *Ex parte Young*, (1907), 209 U. S. 123, 161-163, 28 S. Ct. 441, 454-455.

In *Ritholz vs. North Carolina State Board, etc.*, 18 F. Supp. 409, 412, *supra*, it was pointed out, with citation of cases, that Section 265 forbids injunctions to stay proceedings in state courts not only as against the officers of such courts, but also as against parties to such proceedings. The injunctions which were disapproved

in the *Toucey* case were directed against parties in state court proceedings.

**C. Interference by a Constitutional District Court with Similar Proceedings in a State Court would not be Justified, Even in the Absence of Section 265 of the Judicial Code.**

*Douglas vs. Jeannette* (1942), 319 U. S. 157, 63 S. Ct. 877, arose out of a suit brought under the Civil Rights Act, in the United States District Court for Western Pennsylvania, to restrain threatened criminal prosecutions for violations of a city ordinance which was alleged to deprive the plaintiffs of rights of freedom of speech, press and religion under the United States Constitution<sup>1</sup>. Because the prosecutions were threatened, rather than pending, Section 265 of the Judicial Code did not apply.

The Supreme Court held that although the District Court had jurisdiction, in the sense that it had authority to hear and dispose of the case, there was a lack of equity jurisdiction in that the plaintiffs did not have a cause of action in equity. The Supreme Court therefore affirmed a judgment dismissing the suit. The basis of the lack of equity jurisdiction may best be indicated by quoting from the opinion, as follows (319 U. S. 157, 163-164, 63 S. Ct. 877, 881):

“Congress by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceeding in state courts save in those exceptional cases which call for the interposition of

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<sup>1</sup>The ordinance was held to be unconstitutional in *Murdock vs. Pennsylvania*, 319 U. S. 105, 63 S. Ct. 870, decided the same day as *Douglas vs. Jeannette*.



a court of equity to prevent irreparable injury which is clear and imminent; and equitable remedies infringing this independence of the states—though they might otherwise be given—should be withheld if sought on slight or inconsequential grounds. \* \* \*

“It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. \* \* \*

\* \* \*

“It does not appear from the record that petitioners have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, or that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court.”

In the instant appeal it does not appear that the appellants face any injury other than that incidental to every criminal proceeding brought lawfully and in good faith. Furthermore, the constitutionality of the Rice order may be determined as readily in the contempt proceedings pending against them (including appellate proceedings with respect thereto) as in the instant case brought by them (including appellate proceedings with respect thereto).

**D. The Judges of the Circuit Courts of the Territory are Best Qualified to Determine the Provisions to be Incorporated in Injunctions or Restraining Orders Regulating Picketing.**

It is a doctrine of the *Drivers Union* case that an injunction or restraining order which regulates picketing

may be adjusted to the needs of the particular situation. In the *Drivers Union* case the Supreme Court approved a prohibition against all picketing, on the basis of findings of a master approved by the Illinois court. The Supreme Court stated that it would not re-examine the findings of the master or the testimony considered by him. On this point the opinion contains the following language (312 U. S. 287, 294, 61 S. Ct. 552, 555) :

"It is not for us to make an independent valuation of the testimony before the master. We have not only his findings but his findings authenticated by the State of Illinois speaking through her supreme court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked."

In *Nann vs. Raimist* (1931), 255 N. Y. 307, 174 N. E. 690, 693, the New York Court of Appeals indicated that the provisions of an injunction which regulates picketing should be left largely to the discretion of the chancellor, who has heard the witnesses, familiarized himself with the *locus in quo* and observed the tendencies to disturbance and conflict; and further that an appellate court should not interfere except for manifest abuse. *Nann vs. Raimist* was cited with approval in the *Drivers Union* opinion (312 U. S. 287, 298, 61 S. Ct. 552, 557).

In both the *Drivers Union* case and in *Nann vs. Raimist* the appellate courts approved injunctions which had prohibited all picketing. However, where it is recognized that the circumstances are not such as to justify the prohibition of all picketing, but merely to require the regulation of picketing in order to keep it within lawful bounds, then it can even more forcibly be said that the local judge is best qualified to determine just what regulations and restrictions are appropriate,—i.e., is best qualified to adjust an injunction or restraining order to a particular situation. As the court best qualified to make such adjustment, the local judge should be per-

mitted to determine where picketing should be allowed, the numbers of pickets which should be allowed, the spacing between pickets which should be required, and all other details relating to the regulation of picketing.

The proceedings in which the Rice order was issued, were brought in the Circuit Court of the Territory of Hawaii for the Fifth Circuit. The judge of said Circuit Court holds his hearings at the courthouse of said court, in the town of Lihue on the Island of Kauai. The plantation of The Lihue Plantation Company, Limited is also located on the Island of Kauai, adjoining the town of Lihue. Judge Rice was well qualified to adjust the Rice order to the particular situation presented to him.

On the other hand, although the District Court for the District of Hawaii has power to sit on the Island of Kauai, it does so very seldom. The proceedings in the instant case, before the District Court, were held in Honolulu on the Island of Oahu.

If the Supreme Court does not make an independent valuation of the data considered by a state court as the basis for an injunction or restraining order regulating picketing, certainly the District Court for the District of Hawaii should not make an independent valuation of the data considered by a territorial circuit court as the basis for a similar injunction or restraining order.

**E. There is No Practical Reason Why the District Court for the District of Hawaii Should Supervise Labor Injunction Proceedings in the Territorial Courts.**

Under Section 265 of the Judicial Code a district court is precluded from interfering with proceedings in a state court in which an injunction or restraining order regulating picketing has been issued or to interfere with contempt proceedings in a state court for violation of an injunction or restraining order regulating picketing.

As a practical matter there is no reason why the



rule should be different in the Territory of Hawaii. In this connection it may be noted that under Section 80 of the Hawaiian Organic Act (48 U.S.C. 633) the judges of the territorial circuit courts and also the judges of the supreme court are appointed, for four year terms, by the President of the United States with the advice and consent of the Senate.

We might mention at this time two points which were suggested by appellants, but which do not come within the pleadings in the instant case.

The appellants state that the complaint in the instant case contains allegations that the criminal proceedings against them were not brought in good faith (Op. Br. p. 13). We do not believe that this statement is correct. It is true that the complaint contains allegations that the actions taken by Judge Rice and by the Attorney General constitute a course of action in violation of the rights of plaintiff. Such allegations appear, for example, in paragraph V of the first count (Tr. pp. 6-7), and also in paragraph V of the fourth count (Tr. pp. 15-16). The purport of such allegations, however, is simply that in the opinion of the appellants and their attorneys Judge Rice was in error and without jurisdiction in issuing a restraining order and that the Attorney General is in error in bringing contempt proceedings for violation of the Rice order.

The appellants also claim that they were entitled to show that Judge Rice was disqualified by law under Section 84 of the Organic Act (48 U.S.C. 636) because he is related within the third degree of consanguinity and affinity to stockholders of The Lihue Plantation Company, Limited (Op. Br. p. 21). This claim was not raised by the complaint in the instant case. Furthermore, in accordance with the general rule, the relationship of a judge to a stockholder of an interested corporation is held not to be a disqual-

ification under Section 84. See 30 Am. Jur., Judges, Section 72, 8 A.L.R. 295, 110 A.L.R. 472, *Ewa Plant. Co. vs. Tax Assessor* (1907), 18 H. 509, and *Bruner vs. Brewer* (1911), 20 H. 617. Furthermore, if the Rice order was void because of the disqualification of Judge Rice this matter could be raised in the usual manner, without resort to the District Court.

In addition, even if it be assumed that Judge Rice was disqualified and that his disqualification raised a federal question, nevertheless the district court did not have jurisdiction with respect thereto in the instant case. The complaint in the instant case does not include any allegation of jurisdictional amount. The complaint is brought under Section 24 (14) of the Judicial Code (28 U.S.C. 41(14)). Section 84 of the Hawaiian Organic Act does not provide for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States: it is local in its effect to the Territory of Hawaii and therefore does not come within the scope of Section 24(14) of the Judicial Code.

## PART VI

### CONCLUSION: THE COMPLAINT IN THE INSTANT CASE WAS PROPERLY DISMISSED

The complaint in the instant case contains four counts.

The first count alleges that Judge Rice did not have jurisdiction to issue the Rice order without complying with the provisions of the Norris-LaGuardia Act, because the Circuit Court of the Territory of Hawaii for the Fifth Judicial Circuit is a "court of the United States" (Tr. pp. 5-12). The second count alleges, in the alternative, that the Norris-LaGuardia Act conferred exclusive jurisdiction to issue injunctions and restraining orders in Hawaii

in labor dispute cases on the United States District Court for the District of Hawaii (Tr. pp. 12-13). These two issues relate to the jurisdiction of said Circuit Court. These two issues are not only involved in the *Wirtz* appeal but decision thereon is necessary to a determination of the *Wirtz* appeal. It is our position, not however supported by argument in this brief, that Judge Rice did have jurisdiction to issue the Rice order and that both the first count and the second count fail to state a claim for relief.

The third count alleges that the Rice order was in violation of substantive rights of the appellants under the Clayton Act and the Norris-LaGuardia Act (Tr. pp. 13-14). For the reasons shown in Part IV of this brief the third count fails to state a claim for relief.

The fourth count alleges that the Rice order was in violation of constitutional rights (Tr. pp. 14-20). For the reasons shown in Part III of this brief the fourth count fails to state a claim for relief.

Furthermore, because of the matters set forth in Part V of this brief, relating to the relationships between the United States District Court for the District of Hawaii and the territorial courts, the complaint fails to state a claim for relief.

The answer in the instant case states various defenses of law, in paragraph XXV et seq., which embrace all of the contentions above set forth to the effect that the complaint failed to state a claim for relief (Tr. pp. 78-80). Pursuant to rule 12(d) of the Rules of Civil Procedure the appellees (defendants below) filed a motion for hearing and determination before trial of the defenses of law and for a dismissal of the suit (Tr. pp. 306-309). The motion was granted and the action was dismissed (Tr. pp. 343-344).



The procedure was complicated by two additional motions. In the first place, the appellants (plaintiffs below) filed a motion to strike certain allegations of the answer and exhibits attached to the answer (Tr. pp. 309-310). In the second place, the appellees (defendants below) filed a motion requesting that the district judge take into consideration the whole record in considering the motion to dismiss (Tr. p. 312).

The appellants complain of the treatment of these latter motions (Op. Br. pp. 12-13). If, however, the complaint and each count thereof fails to state a claim for relief, the treatment of these latter motions is of no significance and the dismissal of the action must be affirmed.

It appears from the opinion of Judge McLaughlin that although he felt that he could consider the allegations in the answer and the exhibits if necessary (74 F. Supp. 865, 869), he nevertheless decided as a matter of law that the complaint did not state any claim for relief (74 F. Supp. 865, 869 as to first and second counts, 869-870 as to third count, and 876 as to fourth count).

Respectfully submitted,

  
LIVINGSTON JENKS

*Amicus Curiae* for Hawaii  
Employers Council



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IN THE  
**United States Court of Appeals**  
*For the Ninth Circuit*

CONSTANCIO R. ALESNA, et al.,  
*Appellants,*

vs.

PHILIP L. RICE, as Judge of the  
Circuit Court for the Fifth Judicial  
Circuit of the Territory of Hawaii  
and WALTER D. ACKERMAN,  
JR., as Attorney General of the  
Territory of Hawaii,

*Appellees.*

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Upon Appeal from the United States District Court  
for the District of Hawaii

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*Answering Brief of Appellees*

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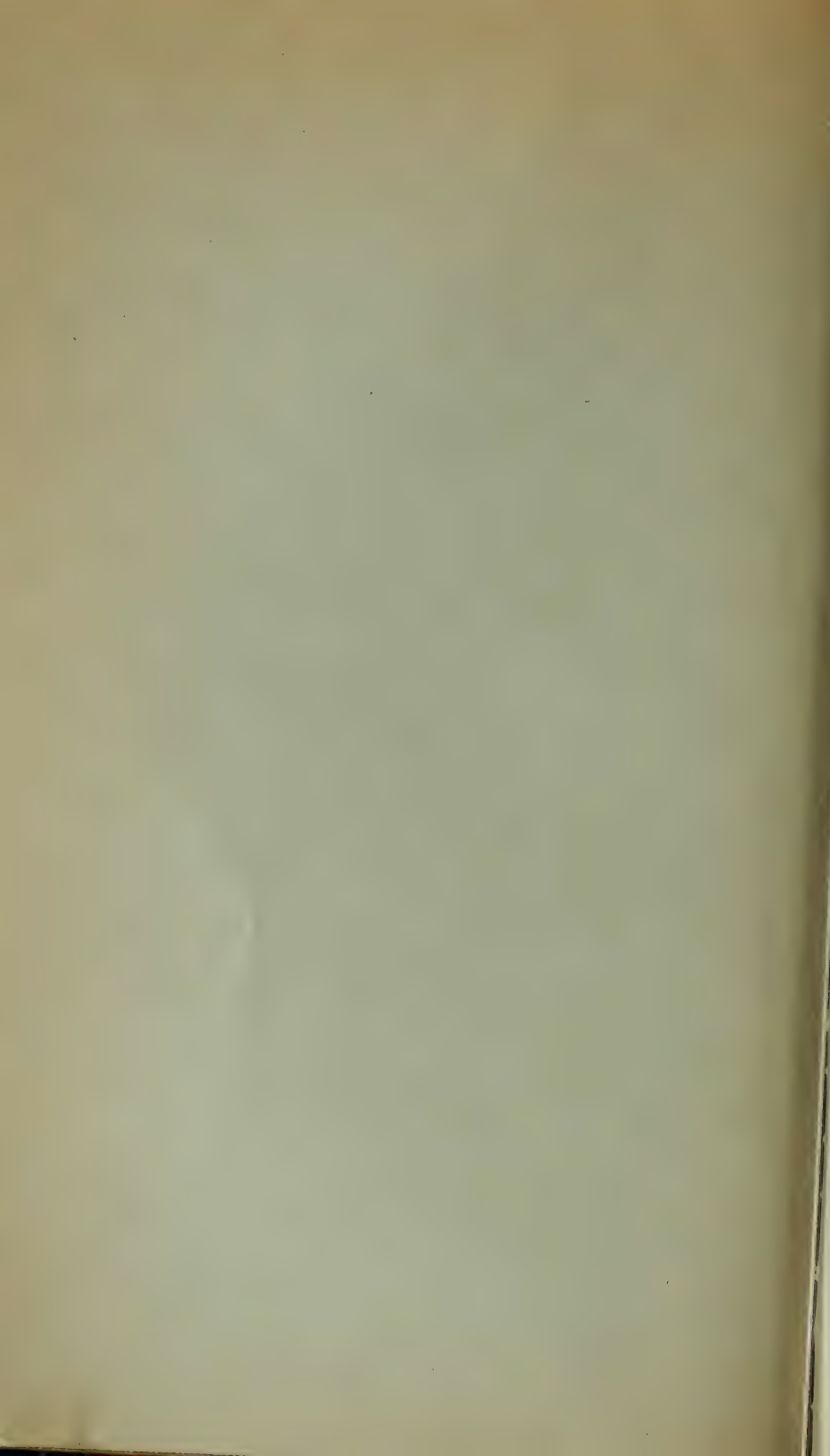
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OCT 18 1948

PAUL P. O'BRIEN, -

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IN THE  
**United States Court of Appeals**  
*For the Ninth Circuit*

CONSTANCIO R. ALESNA, et al.,  
*Appellants,*

vs.

PHILIP L. RICE, as Judge of the  
Circuit Court for the Fifth Judicial  
Circuit of the Territory of Hawaii  
and WALTER D. ACKERMAN,  
JR., as Attorney General of the  
Territory of Hawaii,

*Appellees.*

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***Answering Brief of Appellees***

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JURISDICTION

This is an appeal from a final judgment and decree of the United States District Court for the District of Hawaii. (Rec. p. 344) Appellate jurisdiction to review the final decisions of said District Court is vested in this Court of Appeals. 28 U.S.C. sec. 225.<sup>1</sup>

This case was brought in the District Court for Ha-

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<sup>1</sup>Section 128 of Judicial Code; 28 U.S.C. secs. 1291, 1294, effective September 1, 1948.



waii<sup>1</sup> under 28 U.S.C. sec. 41(14),<sup>2</sup> which confers jurisdiction on district courts of the United States of actions to redress the deprivation, under color of any law, custom or usage of any state, of any right secured by the Constitution, or by any law of the United States providing for equal rights of citizens, or of all persons within the jurisdiction, of the United States. (Rec. pp. 5-22) The action was brought to restrain further proceedings in a criminal contempt case pending in the Circuit Court of the Fifth Circuit, Territory of Hawaii. (Rec. p. 21) Appellees are the presiding judge and prosecutor, respectively, in said contempt proceeding. (Rec. p. 11) Said contempt proceeding was brought to punish violations of a temporary restraining order issued by appellee Circuit Judge to regulate picketing during a strike in the sugar industry in the Territory in 1946. (Rec. pp. 7-9) It was alleged in the complaint that plaintiffs were deprived by the issuance of such order of their right of peaceful picketing under the Norris-La Guardia Act<sup>3</sup> and section 20 of the Clayton Act<sup>4</sup> and under the Constitution of the United States, and were threatened with further deprivation of such right by the prosecution of said contempt charge. (Rec. pp. 6-20) Upon a hearing on the issues of law, a decision against the plaintiffs was rendered and a judgment

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<sup>1</sup>The District Court for Hawaii has the jurisdiction of district courts of the United States. 48 U.S.C. sec. 642. In the revision of Title 28 of the U.S. Code, effective September 1, 1948, the District Court for Hawaii is to all intents and purposes a district court of the United States. 28 U.S.C. secs. 91, 132-135.

<sup>2</sup>Sec. 24(14) of Judicial Code; 28 U.S.C. sec. 1343(3), effective September 1, 1948.

<sup>3</sup>29 U.S.C. secs. 101-115; 47 Stat. 70-73.

<sup>4</sup>29 U.S.C. sec. 52, 38 Stat. 738.

entered dismissing the action. (Rec. pp. 314-340,<sup>1</sup> 343-344) The appeal is from said judgment. (Rec. p. 344)

### STATEMENT OF THE CASE

The statement of the case on pages 4 to 14 of appellants' opening brief is supplemented and controverted in the following respects.

Appellees agree that the restraining order complained of in the instant case was issued *ex parte* and in a labor dispute. It is to be noted, however, that at the *ex parte* hearing, twenty-three affidavits were received in evidence (Rec. pp. 96-158, 163-164, 246-249) and the testimony of nine witnesses heard by the court (Rec. pp. 165-172, 251-299), on the basis of which the court found that the respondents in the equity suit had exceeded the bounds of peaceful picketing in that they had prevented the petitioner's manager and supervisory employees from entering petitioner's sugar factory, had prevented free access to its general merchandise store and in effect had taken possession and control of both factory and store, and also had been guilty of mass picketing and intimidation, and that the petitioner was threatened with irreparable damage by reason of the interruption of its vital operations. (Rec. pp. 173-174, 301-303) Moreover, at the hearing the question of the court's jurisdiction in the matter was raised by the court on its own motion, particularly with reference to the provisions of the Norris-La Guardia and National Labor Relations Acts, and the question argued by counsel for petitioner with citation of authorities. (Rec. pp. 161-163) The jurisdictional question was subsequently raised by counsel for respondents

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<sup>1</sup>74 F. Supp. 865; s.c. 69 F. Supp. 897.

in an oral motion to vacate and dissolve the restraining order and thereupon extensively argued by counsel for the parties and *amicus curiae*. (Rec. pp. 189-193, 235-238) One other fact that may be mentioned in connection with the proceedings in the original suit in equity was the response by the respondents on a day set by the court to consider a possible modification of its order. Instead of the appearance of respondents' counsel, as was expected by the court, the following radiogram message was received:

"RADIOGRAM

"Thufwad 140 Drush Honolulu 23  
Honorable Judge Philip L. Rice  
Judge of the Fifth Circuit Court  
Court House Lihue

"Confirmation copy telephoned Sep. 23, 1946, to Nakamura by F.W. Time 146 P Date 9/23/46

"Re hearing today on possible modification restraining order Lihue Plantation Company case we have instructed our attorneys Richard Gladstein and Richard Mirikitani not to appear, although the court has set hearing for today we have not actually been ordered to appear inasmuch as we regard the court's ex parte restraining order as improperly issue in excess of jurisdiction and denying union members due process of law we see no purpose in being represented at a hearing to modify an order which in the first place we consider to be void and issued in clear defiance of our constitutional right to be heard in advance of being judged once again we ask you to vacate the restraining order.

"INTERNATIONAL LONGSHOREMEN'S  
AND WAREHOUSEMEN'S UNION,

JACK HALL,

Regional Director."

(Rec. p. 194)



As to the pending criminal contempt proceedings, it should be noted that the defendants therein (appellants in the instant case), while they were not named as individual respondents in the equity suit, were all members of the International Longshoremen's & Warehousemen's Union (hereinafter referred to as the ILWU), which was one of the respondents in the equity suit, and all were alleged to have had notice and knowledge of the order which they were charged of violating. Moreover, the alleged violations were (first count) for engaging in mass picketing with others, by assembling in compact groups and congregating in crowds on or near the plantation property, *to thereby prevent and attempt to prevent and physically obstruct and interfere with ingress to and egress from said property* and (second count) for picketing with others in groups of more than three pickets at *points of ingress to and egress from* said property, contrary to the provisions of the order.<sup>1</sup> (Rec. pp. 35, 39, 360, 363)

Appellants are, appellees believe, in error in stating on pages 7 to 8 of the opening brief that at the time their complaint in this case was filed, there was pending in this Court the appeal in *ILWU v. Wirtz*, No. 11568, decided September 27, 1948. The complaint in the instant case was filed January 31, 1947 (Rec. p. 2) but the petition for appeal in the other case was not filed in the Supreme Court of Hawaii until February 21, 1947. (*ILWU v. Wirtz*, Rec. p. 5) Counsel for appellants is also mistaken in the statement on page 8 of the opening brief as to the agreement with the then

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<sup>1</sup>Compare statement of charge on page 7 of opening brief.

defendant attorney general,<sup>1</sup> according to whom the agreement was that in view of the pendency of the *Wirtz* case in the Supreme Court of Hawaii,<sup>2</sup> which was filed November 9, 1946 and decided December 4, 1946 and rehearing denied January 23, 1947, it would not be necessary to file a similar proceeding against appellee circuit judge and that he would not proceed with the criminal contempt case until the decision of the *Wirtz* case by the Supreme Court of Hawaii. The chronological order of the following events, denial of rehearing in the *Wirtz* case by the Supreme Court of Hawaii on January 23, 1947, filing of the complaint in the instant case on January 31, 1947, and the filing of the petition for appeal in the *Wirtz* case from the Supreme Court to this Court on February 21, 1947, definitely substantiates Mr. Tavares' version of the agreement.

Likewise, appellants' statement on page 12 of the opening brief that their motion to strike portions of the answers was filed within the time allowed by Rule 12(f) of the Federal Rules of Civil Procedure is not borne out by the record. The answers were served and filed July 21, 1947 (Rec. p. 304) and the motion was filed August 11, 1947, twenty-one days later. (Rec. p. 310) Rule 12(f) provides that motions to strike shall be filed within twenty days.

Appellees also dispute appellants' statement on page 13 of the opening brief that "the allegation of their complaint . . . included issues of denial of equal pro-

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<sup>1</sup>C. Nils Tavares, Esq., was then attorney general. He was succeeded by Miss Rhoda V. Lewis, who in turn was succeeded by appellee Walter D. Ackerman, Jr. (Rec. pp. 340-341)

<sup>2</sup>37 Haw. 404, reh. den. 37 Haw. 445.

tection of the laws and of criminal proceedings not brought in good faith." In its decision the District Court refers to "plaintiffs' argument that a conspiracy to deny plaintiffs their rights and to single them out for prosecution in order to intimidate others has been alleged in the complaint." (Rec. p. 339) Appellees dispute the argument and categorically deny the base accusation.

## SUMMARY OF ARGUMENT

The United States District Court for the District of Hawaii has jurisdiction under 28 U.S.C. sec. 41(14) [28 U.S.C. sec. 1343(3), effective September 1, 1948] of actions brought to redress the deprivation, under color of territorial law, of a right guaranteed by the Constitution, or a right secured by a Congressional act providing for equal rights. Contra: *Mo Hock Ke Lok Po v. Stainback*, 74 F. Supp. 852. Of the four counts<sup>1</sup> alleged in the complaint, the first and second counts do not fall within the jurisdictional section for the reason that they are based on statutes limiting the jurisdiction of courts, as distinguished from those creating substantive rights. The fourth count, being predicated on the constitutional guaranties of the First Amendment, comes within the provision. As to the third count, which is based on alleged substantive rights under the Norris-La Guardia and Clayton Acts, it is debatable, but there is some authority in support of the jurisdiction.

Although the District Court has jurisdiction of actions to redress the deprivation of civil rights under color of territorial law, such as is stated in the fourth count and possibly the third count in the instant case,

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<sup>1</sup>The counts are summarized on page 18, post.



nevertheless the District Court was precluded from granting the relief sought in this case, which was to enjoin a criminal contempt proceeding pending in a circuit court of the Territory. The provisions of 28 U.S.C. sec. 379 (28 U.S.C. sec. 2283, effective September 1, 1948) prohibit the District Court from issuing any injunction staying a pending proceeding in any territorial court. While the limitation of said section is subject to judicial as well as statutory exceptions, the limitation is nevertheless jurisdictional and there is no exception for civil rights cases. The limitation is especially applicable as to pending criminal prosecutions. While the statute does not refer to the Territory, the statutes relating to the jurisdiction and procedure of the District Court and the cases establishing the relationship between the District Court and the territorial courts require that the limitation be given effect in the Territory. The action should therefore be dismissed.

Another reason for dismissal of the action is that the complaint fails to establish a cause of action for equitable relief. The case does not fall within the recognized exception that a threatened prosecution under an allegedly unconstitutional statute may be enjoined where there is danger of irreparable injury, both great and imminent. In the first place, the prosecution sought to be enjoined in this case is pending, not merely threatened. Furthermore, the incidental injury attendant upon a criminal prosecution, such as the plaintiffs in this case may suffer, is not such an irreparable injury as constitutes ground for equitable relief. The complaint is therefore wanting in equity.

A further jurisdictional objection is that no court of equity can enjoin another court or the judge of another

court, as distinguished from the parties litigant. Furthermore, the party litigant sought to be enjoined in this case is in substance the Territory, which cannot be sued without its consent. These fundamental objections preclude the exercise of jurisdiction in this case.

Moreover, the exercise of jurisdiction in this case is inconsistent with the principle that federal courts will leave matters of local concern or local law to the determination of the local courts. Whether the doctrine established in the alternative ground of decision in *United States v. United Mine Workers*, 330 U.S. 258, 67 S. Ct. 677, is the law of the Territory, is for the territorial courts to decide. If the doctrine should be adopted, as there is every reason to expect, there would be no basis for intervention by the federal court.

The several counts are without merit.<sup>1</sup> The first and second counts are controlled by the decision of this Court in *ILWU v. Wirtz*, decided September 27, 1948. The third count should likewise be rejected, for it is based on the argument that in enacting the Norris-La Guardia Act, Congress was legislating particularly for the Territory. The fourth count is governed by the doctrine of *Drivers Union v. Meadowmoor Co.*, 312 U.S. 287, 61 S. Ct. 552. The right to picket is a qualified, not an absolute, right. Where past picketing has been accompanied by violence, coercion or other unlawful conduct such as to give rise to a justifiable belief that future picketing is likely to result in a continuance of violence, coercion or other unlawful acts, a court of equity has the power to regulate picketing and even prohibit all picketing, consistently with the Constitution. Regulations designed to prevent obstruction of

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<sup>1</sup>The counts are summarized on page 18, post.

points of ingress and egress, such as are involved in the instant case, are especially proper and generally sustained. Other objections to the order complained of by appellants, as well as the theory of substantive rights advanced by appellants in the third count, are answered in the brief of *amicus curiae*, which appellees herein adopt.

Furthermore, the merits of this cause are entirely immaterial in the light of the alternative ground of decision in the *United Mine Workers* case, which held that even if a court exceeded its jurisdiction in issuing an order, a violation of such order pending the determination of the court's jurisdiction constitutes criminal contempt, and *a fortiori*, regardless of the constitutionality of the order. Hence, even if the merits of all of the four counts should be sustained, which is, of course, denied, still there would be no basis for granting relief in the instant case.

The procedural objections raised by appellants are likewise without merit.

It is concluded that appellees' motions were properly granted and the judgment of the District Court should be affirmed.

## ARGUMENT

### I. JURISDICTION OF DISTRICT COURT

#### A. *Jurisdiction under 28 U.S.C. sec. 41 (14)*

This suit was brought under the provisions of section 41, subdivision 14, of Title 28 of the United States Code.<sup>1</sup> The cause of action is stated in four counts,

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<sup>1</sup>Sec. 24(14) of Judicial Code; 28 U. S. C. sec. 1343 (3), effective September 1, 1948.



each of which was alleged to have been brought under said section. (Rec. pp. 5-22) In order that the question of jurisdiction may be properly considered, a brief analysis of the provisions of the section will first be made and then the several counts will be examined in the light of the applicable rules.

Section 41(14) confers jurisdiction on the district courts of the United States in the following cases:

“(14) *Suits to redress deprivation of civil rights.*

“Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.”

## 1. REQUIREMENTS FOR JURISDICTION

In order that an action may be maintained under the section, the gist of the action must be for the deprivation, (1) under color of a law, statute, ordinance, regulation, custom, or usage of a *state*, (2) of either a right, privilege or immunity secured by the Constitution or a right secured by a federal law providing for equal rights of citizens of the United States or of all persons within the jurisdiction. For the purposes of this case, two questions are involved, first, whether the Territory is a *state* within the meaning of the section, and secondly, whether the counts involve a right secured by the Constitution or a right secured by a federal law providing for equal rights.

**a. Deprivation under color of "state" law**

The first question was considered by the Court and counsel in the proceedings in the District Court. Counsel for appellants argued and counsel for appellees agreed, and the Court held, that the Territory was included within the term *state* as used in said section. (Rec. p. 317; Op. Br. p. 2) Our position was based on an interpretation of the legislative history of the section.

The derivation of the section has been set forth in a number of cases, including *Hague v. CIO*, 307 U.S. 496, 59 S. Ct. 954, in which its history is traced in a note on page 508 of the official edition as follows:

"The section is derived from R. S. 563, § 12, which, in turn, originated in § 3 of the Civil Rights Act of April 9, 1866, 14 Stat. 27, as re-enacted by § 18 of the Civil Rights Act of May 31, 1870, 16 Stat. 144, and referred to in § 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13."<sup>1</sup>

The jurisdictional section is to be compared with the substantive provision, section 43 of Title 8 of the United States Code, which was derived from Rev. Stat. sec. 1979, which in turn was derived from section 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13.<sup>2</sup> The section now reads:

"§ 43. *Civil action for deprivation of rights.*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be sub-

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<sup>1</sup>The successive provisions referred to are set forth in the Appendix, pp. 73-75.

<sup>2</sup>The successive provisions referred to are set forth in the Appendix, pp. 75-76.

jected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The noteworthy change, for the purposes of this discussion, came in the Revised Statutes. In the substantive provision the revisers added the words *or Territory* after the word *state* but not in the jurisdictional section. Whatever may have been the reason for the amendment to the substantive section, the words inserted may not be disregarded but must be taken as part of the existing law. *U.S. v. Bowen*, 100 U.S. 508, 25 L. Ed. 631. The question is then whether the action of the revisers in expressly providing for rights of action for deprivation of civil rights under color of territorial authority should be set at naught for failure to provide a forum for the enforcement of such rights. Such a conclusion could be avoided either by construing the word *state*, as used in the jurisdictional section, to include the territories, as in *Andres v. United States*, 333 U.S. 740, 68 S. Ct. 880, wherein the word *state* as used in 18 U.S.C. sec. 542<sup>1</sup> was construed to include the Territory, or by determining that the jurisdictional section applies to the Territory by virtue of the provisions of the Hawaiian Organic Act which give the District Court the jurisdiction and procedure of a district court of the United States (48 U.S.C. secs. 642, 645).<sup>2</sup> Of course, Hawaii was not a territory when the Revised Statutes were enacted in 1873, but other territories existed and it is pertinent to determine what the revisers intended as to a forum for the enforcement of civil rights in the

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<sup>1</sup>18 U.S.C. sec. 3566, effective September 1, 1948.

<sup>2</sup>The statutes are set out in the Appendix, pp. 76-77.



territories. In the Revised Statutes the jurisdiction of the district courts in the territories was defined to include the "same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States . . ." Rev. Stat. sec. 1910. We argued that it was reasonable to suppose that the revisers did not insert the words *or Territory* in the jurisdictional section because Rev. Stat. sec. 1910 made it unnecessary to do so and that by like reasoning the provisions of the Hawaiian Organic Act make it unnecessary for the word *Territory* to appear in section 41 (14) in order that the provision may apply to the Territory.

However, as pointed out in the Court's opinion (Rec. p. 317), the conclusion was contrary to the ruling of a three-judge court sitting as the United States District Court for Hawaii in *Mo Hock Ke Lok Po v. Stainback*, 74 F. Supp. 852 (appeal pending in U.S. Supreme Court), wherein it was held that section 41 (14) did not apply to actions for deprivation of civil rights under color of territorial law and that the remedies for such violation lay in the courts of the Territory unless the jurisdictional amount of \$3,000 is present.

There are a few other cases in which the meaning of the word *state* and the significance of the omission of the word *territory* in the statutes have been considered. In *Insular Police Commission v. Lopez*, 160 F. 2d 673 (C.A. 1st, 1947), *cert. den.* 331 U. S. 855, 67 S. Ct. 1743, the Court had under consideration a suit brought in the United States District Court for Puerto Rico under the Selective Training and Service Act of 1940, as amended, by which the plaintiff sought to obtain reinstatement in his former position as a police officer in the employ of the defendant police commission. The trial court held for the plaintiff but the appellate

court vacated the judgment and remanded the case with directions to dismiss the petition for lack of jurisdiction. The Court of Appeals held that the provision for restoration to employment in the United States government and its territories or possessions was unenforceable. As to the suggestion that jurisdiction of the action was sustained under 28 U.S.C. sec. 41(14), the Court pointed out that the provision would not apply in the case of a suit brought against an official of the United States since such an official could not be said to be acting "under color of any law . . . of any state", and indicated that a similar reasoning would apply in the case of a territorial official. The Court also pointed out that a right provided for by the Selective Service and Training Act could not be regarded as a "right secured by any law of the United States providing for equal rights of citizens of the United States". In another case, *Shimola v. Local Board No. 42 for Cuyahoga County*, 40 F. Supp. 808 (D.C.N.D. Ohio, 1941), it was likewise pointed out that section 41(14) does not cover an action brought against a local draft board because the action of such boards was under federal law and therefore could not be said to be under color of any law of any state.

In *Picking v. Pennsylvania R. Co.*, 151 F. 2d 240 (C.A. 3d, 1945) *cert. den.* 332 U. S. 776, 68 S. Ct. 38, a distinction between 8 U.S.C. sec. 43, the substantive section, and section 20 of the Criminal Code (18 U.S.C. sec. 52)<sup>1</sup> was pointed out on the ground that while the civil provision relates to deprivation under color of law "of any state or territory" the Criminal Code provision is not so limited. On the basis of such a difference, it

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<sup>1</sup>The text is set out in the Appendix, pp. 77-78. Effective September 1, 1948, the section is 18 U.S.C. sec. 242.

was stated a federal officer is liable under the provisions of the Criminal Code but may not be sued under the civil substantive section "except under the laws of the United States in effect in a territory". 151 F. 2d 240, 251, n. 12. The basis for such an exception is not stated. It would seem that unless the officer could be said to have acted under color of territorial law, he would not be liable under the civil section. The question of what court would have jurisdiction to enforce the civil liability in such a case was also not considered.

Another substantive section, 8 U.S.C. sec. 42 (Rev. Stat. sec. 1978, derived from sec. 1 of the Civil Rights Act of April 9, 1866), providing that "all citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property" was under consideration by the Supreme Court in *Hurd v. Hodge*, 334 U. S. 24, 68 S. Ct. 847. As to whether the section applied to citizens residing in the District of Columbia, the Court stated:

" . . . We have no doubt that, for the purposes of this section, the District of Columbia is included within the phrase 'every State and Territory.' "

334 U. S. 24, 31

Since the statute was relied upon by the defendants in defending the action to enforce restrictive covenants against them, the jurisdiction of the court was not dependent on civil rights.

On the basis of these cases, it is apparent that the substantive provisions on civil rights are broader than the jurisdictional provisions. Notwithstanding such adverse indications, we are maintaining our previous position that the provisions of section 41(14) apply



to deprivation of civil rights under color of territorial law.

**b. The nature of the right deprived**

The second requirement under consideration for a cause of action under section 41(14) is that the right deprived must be one secured by the Constitution or by a federal law providing for equal rights. Not all cases of alleged deprivation of constitutional rights come within the scope of the section. *Snowden v. Hughes*, 321 U. S. 1, 64 S. Ct. 397; *Williams v. Miller*, 48 F. Supp. 277 (D.C.N.D. Cal., 1942), *aff'd* 317 U. S. 599, 63 S. Ct. 258. It is clear, however, that actions to redress any deprivation of the guaranties of freedom of speech and of peaceful assembly are covered by the section. *Hague v. CIO*, 307 U. S. 496, 59 S. Ct. 954; *Douglas v. Jeannette*, 319 U. S. 157, 63 S. Ct. 877. Such cases are within the jurisdiction of district courts regardless of the amount in controversy. *Hague v. CIO*, *supra*; *Douglas v. Jeannette*, *supra*; *A.F. of L. v. Watson*, 327 U. S. 582, 590, 66 S. Ct. 761. Also, the deprivation of any right derived from any of the Civil Rights Acts would clearly come under the section, but as to rights under other federal statutes it is not at all clear. In the discussion of *Insular Police Commission v. Lopez*, *supra*, on page 15 of this brief, it was noted that the Selective Service Act was not regarded by the Court of Appeals as a law providing for equal rights of citizens. On the other hand, in *United Electrical, R. & M. Workers v. Baldwin*, 67 F. Supp. 235, 239 (D. C. Conn., 1946), the court ruled that "a conspiracy to discourage collective bargaining is a deprivation of the rights secured by the Wagner Act, and therefore also a basis of suit under the Civil Rights Act and Section 24(14) of the Judicial Code . . ." Since the Norris-

La Guardia and Clayton Acts are more like the Wagner Act than the Selective Service Act, the former case may not be in point and the latter may be regarded as a persuasive authority.

## 2. ANALYSIS OF COUNTS

It was noted at the beginning of this discussion that plaintiffs' complaint includes four counts, each of which is brought under 28 U.S.C. sec. 41(14).<sup>1</sup> The gist of each count may be stated as follows:

1. That the circuit courts of the Territory are *courts of the United States* within the meaning of the Norris-La Guardia Act and subject to its jurisdictional limitations; that the order complained of was issued in violation of such limitations and was therefore void.

2. That under the Norris-La Guardia Act, the United States District Court for Hawaii has exclusive jurisdiction to issue injunctions in labor disputes in the Territory; that any injunction issued by a circuit court of the Territory would accordingly be void.

3. That the Norris-La Guardia and Clayton Acts created certain substantive rights of labor; that the order in question violated such rights and was therefore void.

4. That the order in question contravened the rights of freedom of speech and peaceful assembly guaranteed by the Constitution.

It is to be noted that although each count refers to the Norris-La Guardia and Clayton Acts, it is only in the third count that the alleged substantive rights under

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<sup>1</sup>The counts are summarized in the opening brief at pp. 8-9 and in an opinion of the District Court, Rec. pp. 58-59.

said Acts are relied upon as the cause of action. The first count is based on plaintiffs' contention that the Circuit Court of the Fifth Circuit, Territory of Hawaii, is a *court of the United States* within the meaning of the Norris-La Guardia Act and therefore without jurisdiction to issue injunctions in labor disputes except in compliance with the provisions of said Act; the second on the theory that under the Norris-La Guardia Act, the United States District Court for Hawaii has exclusive jurisdiction to issue injunctions in labor disputes in the Territory; the third on the theory of substantive rights; and the fourth count on the rights of freedom of speech and of peaceful assembly guaranteed by the First Amendment of the Constitution.

Appellees contend that the first and second counts do not come within the provisions of section 41(14). Said counts are not based on any substantive right claimed under the Norris-La Guardia or Clayton Acts but are based on provisions thereof limiting the jurisdiction of courts; otherwise they would merely duplicate the third count. On the other hand, appellees concede that the fourth count falls within the jurisdictional provision. The third count appears to be a debatable matter. As noted on page 18 of this brief, there is some indication that labor laws may be regarded as equal rights laws.

In short, appellees contend that the District Court for Hawaii has jurisdiction of actions to redress deprivation of civil rights under color of territorial law and that in the instant case the District Court had jurisdiction of the fourth count and possibly of the third, but not the first and second counts.



*B. Limitation of 28 U.S.C. sec. 379*

In opposition to the motion for a preliminary injunction, appellees contended that the District Court was without jurisdiction in equity to restrain proceedings pending in a circuit court of the Territory to enforce the criminal laws of the Territory. (Rec. p. 52) The contention was based on the provisions of section 379 of Title 28 of the United States Code,<sup>1</sup> which provided:

“§ 379. (*Judicial Code, section 265.*) *Same; stay in State courts.*

The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.”

The Court, however, stated that the provision “is not jurisdictional, and has recognized exceptions,” citing the case of *Toucey v. New York Life Insurance Co.*, 314 U. S. 118, 62 S. Ct. 139, and ruled against appellees. (Rec. p. 64) The Court also adhered to that ruling in its final decision. (Rec. p. 323) Appellees respectfully submit that the Court erred in its ruling and in its construction of the *Toucey* case and that the complaint should have been dismissed on the basis of this statute.

**1. A JURISDICTIONAL LIMITATION**

The Court was correct in stating that there are exceptions to the statute. The recognized exceptions are carefully enumerated in the opinion by Mr. Justice Frankfurter in the *Toucey* case, and were then limited

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<sup>1</sup>Sec. 265 of Judicial Code; 28 U.S.C. sec. 2283, effective September 1, 1948.

to four statutory exceptions<sup>1</sup> and one judicial exception.<sup>2</sup> But it is not correct, it is respectfully submitted, that the Supreme Court in the *Toucey* case regarded the statute as not jurisdictional. Throughout its opinion the Court was considering a question of the power of the federal courts to stay proceedings in state courts. Thus, in the very first paragraph of the opinion, it is stated that the question before the Court was, "Does a federal court have power to stay a proceeding in a state court . . ." (p. 126); further on in the opinion there is a quotation referring to the statute as " 'a limitation of the power of federal courts dating almost from the beginning of our history and expressing an important Congressional policy—to prevent needless friction between state and federal courts' " (p. 129); and toward the end of the opinion it is stated that the statute "is not an isolated instance of withholding from the federal courts equity powers possessed by Anglo-American courts" and that "we must be scrupulous in our regard for the limits within which Congress has confined the authority of the courts of its own creation" (p. 141). The limitation of section 379 was, therefore, clearly regarded as jurisdictional by the Court.<sup>3</sup>

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<sup>1</sup>A recent statutory exception is noted in *Bowles v. Willingham*, 321 U. S. 503, 510, 64 S. Ct. 641.

<sup>2</sup>The Reviser's note on 28 U.S.C. sec. 2283 points out that a second judicial exception was recognized prior to the *Toucey* case, which is now embodied in the statute. 1948 U.S. Code Congressional Service, p. 1910.

<sup>3</sup>However, in the dissenting opinion of Mr. Justice Reed it was stated that section 379 was "merely a limitation on general equity powers" as distinguished from the Norris-La Guardia Act, which is "a denial of jurisdiction to enjoin." 314 U.S. 118, 154, n. 24; 62 S. Ct. 139.

## 2. NO EXCEPTION FOR CASES UNDER CIVIL RIGHTS ACTS OR NORRIS-LA GUARDIA OR CLAYTON ACTS

The recognized statutory exceptions to section 379 do not include either the Civil Rights Acts or the Norris-La Guardia or Clayton Acts. Nor is there any recognized judicial exception for cases arising under said Acts. On the contrary, there are indications that the section applies equally in civil rights cases. In *Mickey v. Kansas City, Mo.*, 43 F. Supp. 739 (D.C.W. D. Mo., 1942), plaintiffs brought an action under 28 U.S.C. sec. 41(14) to redress an alleged deprivation of their right of freedom of religion and to restrain enforcement of certain ordinances alleged to be in violation of their constitutional rights, including the prosecution of pending criminal prosecutions. Quoting section 379, the District Judge ruled that the plaintiffs could not have an injunction interfering with the pending cases. It is to be noted that the case involved a right guaranteed by the First Amendment. For the purposes of determining the applicability of jurisdictional provisions, such as 28 U.S.C. sec. 41(14) and 28 U.S.C. sec. 379, there would seem to be no distinction between freedom of religion and freedom of speech or peaceful assembly. The case is therefore deemed directly in point. In another case, *Hemsley v. Myers*, 45 Fed. 283 (C.C. Kan., 1891), it was contended that the Civil Rights Act, specifically 8 U.S.C. sec. 43, in effect repealed or abrogated the provisions of section 379. In denying the contention, the Court said:

“ . . . The section [8 U.S.C. sec. 43] does not repeal, limit, or restrict the previously existing rules affecting the relations of the state and the United States courts, nor does it abolish the distinction between law and equity, or change the rules of pleading or mode of proceeding in any respect. . . ”

45 Fed. 283, 290.



Although the case did not involve rights under the First Amendment, it did involve a constitutional right in that the plaintiffs were relying on the Interstate Commerce Clause in seeking to restrain further prosecution of a pending suit for injunction against the plaintiffs, as well as other threatened injunction suits and criminal and contempt proceedings in the state court. Similarly, a three-judge court sitting as the District Court for the Southern District of New York, in *Davega-City Radio, Inc. v. Boland*, 23 F. Supp. 969, held that section 379 prohibited the granting of an injunction sought by the plaintiff which would in effect enjoin enforcement of an order which was issued by the state court to enforce the provisions of the state labor relations law. The plaintiff had claimed that the proceedings under the state law were invalid for the reason that plaintiff was engaged in interstate commerce and therefore subject exclusively to the jurisdiction of the National Labor Relations Act. A case more in point is *United Electrical, R. & M. Workers v. Westinghouse El. Co.*, 65 F. Supp. 420 (D.C.E.D. Pa., 1946), where the union sued to restrain further proceedings in a suit brought by the company in a state court to enjoin a strike. The action was held not to be within any exception to section 379 and therefore subject to its limitation, notwithstanding the fact that the union had invoked its rights under the Norris-La Guardia and Wagner Acts. And, directly in point is *Carras v. Monaghan*, 65 F. Supp. 658 (D.C.W.D. Pa., 1946), where the statute was applied in an action brought by a union to enjoin the enforcement of an injunction issued in a labor dispute. The case is discussed more fully on page 57 of this brief. These cases show that the civil rights and labor laws do not constitute implied exceptions to the laws governing the jurisdiction and

procedure of the federal courts.

### 3. APPLICATION TO PENDING CRIMINAL PROSECUTIONS

The provisions of section 379 are especially applicable to cases in which it is sought to restrain further prosecution of a criminal proceeding pending in a state court. Thus, in *Harkrader v. Wadley*, 172 U. S. 148, 19 S. Ct. 119, the petitioner in a habeas corpus proceeding requested an injunction to restrain further prosecution of an embezzlement charge pending in a state court, contending that the indictment was obtained by the use of a deposition which he had made in a suit in a federal court, in violation of his constitutional rights. The Supreme Court, in reversing the action of the trial court granting the injunction, pointed out that even apart from the effect of section 379, "the general rule, both in England and in this country, is that courts of equity have no jurisdiction, unless expressly granted by statute, over the prosecution, the punishment or pardon of crimes and misdemeanors . . . and that to assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses . . . is to invade the domain of the courts of common law . . ." and, taking the statute into account, held that a federal court of equity "has no jurisdiction to stay by injunction proceedings pending in a state court in the name of the State to enforce the criminal laws of such State." 172 U.S. 148, 165, 170. Likewise, in *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U.S. 207, 23 S.Ct. 498, an action seeking to restrain further prosecution of a violation of an ordinance prohibiting the erection of gas tanks in certain parts of the city was dismissed on the ground that federal equity courts have no power to enjoin criminal pro-

ceedings pending in state courts. Again, in the leading case of *Ex parte Young*, 209 U. S. 123, 28 S. Ct. 441, wherein the Supreme Court established the exception that federal courts of equity have jurisdiction to enjoin *threatened* prosecutions for violations of an allegedly unconstitutional statute of a state, the Court recognized that "the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court," citing *Harkrader v. Wadley*, *supra*. 209 U.S. 123, 162.

The distinction between threatened and pending prosecutions was brought out sharply in *Cline v. Frink Dairy Co.*, 274 U.S. 445, 47 S. Ct. 681, which was an action brought before a three-judge federal court in Colorado to enjoin the enforcement of a state anti-trust law on the ground of its unconstitutionality. It was alleged that plaintiffs were threatened with further prosecution of a criminal charge then pending as well as of future criminal and civil prosecutions under the state law, and relief against all such prosecutions was sought. An injunction was granted by the trial court against all further prosecution, including the pending case. Upon direct appeal to the Supreme Court, it was held, on the authority of *Ex parte Young*, *supra*, that a pending prosecution in a state court could not be enjoined, and accordingly, the injunction was modified and reversed so far as it purported to enjoin further prosecution of the pending criminal case and allowed to stand only as to threatened prosecutions.

The distinction between threatened and pending prosecutions has been followed consistently by the federal courts (Taylor and Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 Yale Law Journal 1169, 1191) and has been expressly recog-



nized in the Ninth Circuit, as is shown by the opinion of the Court in *Babcock v. Noh*, 99 F. 2d 738, 739-740 (C. A. 9th, 1938) :

“In support of the decree appellee argues broadly that a court of equity may enjoin a criminal prosecution under a void statute where such prosecution amounts to a wrongful invasion of a property right, citing *Truax v. Raich*, 239 U. S. 33, 36 S.Ct. 7, 60 L.Ed. 131, L.R.A.1916D, 545, Ann.Cas.1917B, 283; *Packard v. Banton*, 264 U.S. 140, 44 S.Ct. 257, 68 L.Ed. 596; *Hygrade provision Co. v. Sherman*, 266 U.S. 497, 45 S.Ct. 141, 69 L.Ed. 402; *Terrace v. Thompson*, 263 U.S. 197, 44 S. Ct. 15, 68 L. Ed. 255, and other similar cases. However, the present suit is not within the principle announced in these authorities. What was sought in those cases was relief against threatened, not pending, prosecutions; and in them the court proceeded upon the view that one is not compelled to test the constitutionality of an act by first incurring drastic penalties attached to its violation, but may, under extraordinary circumstances, appeal to equity for relief against the invasion of his property rights through the threatened enforcement of the statute. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, 13 L.R.A.,N.S., 932, 14 Ann.Cas.764; *Fenner v. Boykin*, 271 U.S. 240, 46 S.Ct. 492, 70 L.Ed. 927; *Terrace v. Thompson*, *supra*. Here, no threat of the institution of other criminal proceedings under the act is alleged in the bill or found to have been made. The relief sought is against the further prosecution of the pending case. Compare *Ritholz v. North Carolina State Board*, D.C., 18 F. Supp. 409, 412.

The constitutional question said to be for determination by the Federal court is one which the state court is competent to deal with in the criminal action pending before it. Its decision of the

Federal question is subject to ultimate review in the Supreme Court of the United States. An adequate legal remedy is thus available. *Fenner v. Boykin*, *supra*. There is plainly no warrant for equitable interference with the proceedings in the state tribunal, even in the absence of the prohibition against such interference contained in § 265 of the Judicial Code, 28 U.S.C.A. § 379. Concerning the scope of this prohibition see *Hill v. Martin*, 296 U.S. 393, 403, 56 S.Ct. 278, 282, 80 L.Ed. 293; *Essanay Film Mfg. Co. v. Kane*, 258 U.S. 358, 361, 42 S.Ct. 318, 319, 66 L.Ed. 658."

#### 4. APPLICABILITY TO THE TERRITORY

The foregoing discussion of 28 U.S.C. sec. 379 would not be pertinent, of course, unless the Territory is included in the term *state* as used in the section. In the proceedings in the District Court appellees contended, and the Court held, that the section applied to actions in the courts of the Territory. (Rec. p. 64) Appellees' position was, and still is, that the relation between the United States District Court for Hawaii and the territorial courts is the same as that between the courts of the United States and the state courts. Under the provisions of the Hawaiian Organic Act, particularly 48 U.S.C. sec. 642, which provides that the District Court for Hawaii "shall have the jurisdiction of district courts of the United States", and 48 U.S.C. sec. 645, which provides that "the laws of the United States relating to appeals, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii," it is reasonable to assume that the District Court for Hawaii is subject to the same jurisdictional limitations as to

matters pending in the territorial courts as the federal courts in the several states are with regard to pending cases in the state courts. Moreover, it has been noted that the jurisdiction of the District Court in this case depends upon a similar problem of statutory construction, that is, a construction of 28 U.S.C. sec. 41(14) to include territorial law by its reference to *state* law. In contending that the word *state* in both instances includes the Territory, appellees rely on the line of cases showing the relationship between the territorial and the federal courts.

In one of the first cases to reach this Court after the organization of the Territory, *Wilder's S. S. Co. v. Hind*, 108 Fed. 113 (C.A. 9th, 1901), *aff'd* 183 U.S. 545, 22 S. Ct. 225, this Court laid down the rule, although it was merely a dictum at the time, that the relation between the District Court for Hawaii and the territorial courts is the same as between the federal courts and the state courts in the various states.

"... Upon consideration of the various provisions of the act providing a government for the territory of Hawaii, we are convinced that congress intended thereby to establish in that territory between the federal court created by the act and the system of territorial courts then existing, and substantially by the act perpetuated, the relation which exists between the courts of the United States and the state courts in the various states. It is not disputed that congress had the power to create in the territory of Hawaii such a system of courts, and to establish such a relation between them. The purpose to do so is manifest from various provisions of the act. . . ."

108 Fed. 113, 114-115



That rule was relied upon for the decision of this Court in *Yeung v. Territory of Hawaii*, 132 F. 2d 374 (C.A. 9th, 1942), which involved the question of whether the Territory was within the provisions for removal of criminal cases against federal officers from a state court to a federal court (28 U.S.C. sec. 76<sup>1</sup>), and the rule has obtained generally in the District Court for Hawaii. *In the Matter of Marshall*, 1 U.S.D.C. Haw. 34 (1900); *In the Matter of Atcherly*, 3 U.S.D.C. Haw. 404 (1909); *Soga v. Jarrett*, 3 U.S.D.C. Haw. 502 (1910); *In the Matter of Curran*, 4 U.S.D.C. Haw. 730 (1916). More recently, there is the case of *Mo Hock Ke Lok Po v. Stainback*, *supra*, wherein the majority of the three-judge court held that the Territory was included in the provisions for three-judge courts, 28 U.S.C. sec 380,<sup>2</sup> construing the word *state* as used in the statute to be applicable to the Territory. 74 F. Supp. 852, 858-861. Another instance of a construction of the word *state* to include the Territory is *Andres v. United States*, 333 U.S. 740, 68 S. Ct. 880, wherein 18 U.S.C. sec. 542, relating to the death penalty, was so construed.

The specific question of whether section 379 applies in the Territory<sup>3</sup> has been considered only by District Judge McLaughlin, who decided the instant case and also *Hall v. Hawaiian Pineapple Co.*, 72 F. Supp. 533 (D.C. Haw., 1947). In each case Judge McLaughlin deemed it applicable but, construing the

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<sup>1</sup>28 U.S.C. sec. 1442, effective September 1, 1948.

<sup>2</sup>Judicial Code sec. 266; 28 U.S.C. secs. 2281, 2284, effective September 1, 1948.

<sup>3</sup>This problem of construction could arise only in a territory having separate systems of federal and territorial courts.

statute not to be jurisdictional and subject to exception in exceptional circumstances, proceeded nevertheless to a consideration of the merits of the cases. However, neither case is inconsistent with the rule as to the relationship of the courts. Appellees respectfully submit that the District Court was correct in deeming the statute applicable but in error in making an exception to its limitation.

### C. *Limitations on equity jurisdiction*

The District Court, it has been noted, ruled in granting the preliminary injunction that although the provisions of 28 U.S.C. sec. 379 applied, the statute was not jurisdictional and was subject to exception in cases where there are "exceptional circumstances of peculiar urgency" (Rec. p. 64), and in its final decision in the case adhered to its previous ruling. (Rec. p. 323) Similarly, in *Hall v. Hawaiian Pineapple Co.*, *supra*, the Court held that "where there is basic equity jurisdiction, plus exceptional circumstances showing a danger of irreparable injury both great and immediate, a federal court may enjoin, despite the comity statute [28 U.S.C. sec. 379], even a criminal proceeding in a state court", citing *Douglas v. Jeannette*, 319 U.S. 157, 63 S. Ct. 877, and referring to the cases cited in its ruling in this case (Rec. pp. 64-65). 72 F. Supp. 533, 535. Appellees submit that the ruling of the District Court in this regard is contrary to the authorities, *Toucey v. New York Life Insurance Co.*, *supra*, and *Bowles v. Willingham*, *supra*, discussed on pages 20 to 21 of this brief, and a misapplication of the exception stated in the case of *Douglas v. Jeannette*, *supra*, to the general rule that equity will not restrain criminal prosecutions. As shown on pages 20 to 21 of this brief, there are but few recognized exceptions to section 379 and

the exception made by the District Court in this and the *Hall* case is not one of them. The exception to the general rule that equity will not restrain criminal prosecutions is, it will be shown, applicable only to threatened prosecutions under allegedly unconstitutional statutes, and not to pending prosecutions.

### 1. THE RULE OF DOUGLAS V. JEANNETTE

*Douglas v. Jeannette*, *supra*, was a case brought under the Civil Rights Acts in a United States District Court for Western Pennsylvania to restrain threatened criminal prosecutions in the state courts to enforce an allegedly unconstitutional ordinance prohibiting solicitation of orders for merchandise without first procuring a license and paying a license tax. Plaintiffs, who were Jehovah's Witnesses, claimed the ordinance abridged the guaranties of freedom of speech, press and religion of the First Amendment, which are made applicable to the states by the Fourteenth Amendment. Plaintiffs alleged that they had been previously prosecuted and that they were threatened with further prosecution under the ordinance. The trial court, after trial, issued a permanent injunction enjoining enforcement of the ordinance, but on appeal the Court of Appeals for the Third Circuit reversed the judgment on the merits. Upon appeal to the Supreme Court, the Court likewise held that the complaint failed to establish a cause of action in equity and affirmed the judgment of the Court of Appeals. Concurrently, the Court ruled in a companion case, *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S. Ct. 870, that the ordinance was unconstitutional. That the case concerned *threatened* criminal prosecutions, as distinguished from pending prosecutions, is shown by the following references (emphasis has been added) :



"Petitioners brought this suit in the United States District Court for Western Pennsylvania to restrain *threatened criminal prosecution* of them in the state courts by respondents, the City of Jeannette (a Pennsylvania municipal corporation) and its Mayor, for violation of a city ordinance which prohibits the solicitation of orders for merchandise without first procuring a license from the city authorities and paying a license tax. . . .

". . . It is alleged that in April, 1939, respondents arrested and prosecuted petitioners and other Jehovah's Witnesses for violation of the ordinance because of their described activities in distributing religious literature, without the permits required by the ordinance, and that *respondents threaten to continue to enforce the ordinance* by arrests and prosecutions—all in violation of petitioners' civil rights.

". . . In substance, the complaint alleges that respondents, proceeding under the challenged ordinance, by arrest, detention and by criminal prosecutions of petitioners and other Jehovah's Witnesses, had subjected them to deprivation of their rights of freedom of speech, press and religion secured by the Constitution, and *the complaint seek equitable relief from such deprivation in the future.*

"Notwithstanding the authority of the district court, as a federal court, to hear and dispose of the case, petitioners are entitled to the relief prayed only if they establish a cause of action in equity. Want of equity jurisdiction, while not going to the power of the court to decide the cause, *Di Giovanni v. Camden Ins. Assn.*, 296 U.S. 64, 69; *Pennsylvania v. Williams*, 294 U.S. 176, 181-82, may nevertheless, in the discretion of the court, be objected to on its own motion. *Twist v. Prairie Oil Co.*, 274 U.S. 684, 690; *Pennsylvania v.*

*Williams, supra*, 185. Especially should it do so where its powers are invoked to interfere by injunction with *threatened criminal prosecutions* in a state court.

“ . . . Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass *threatened proceedings* in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; and equitable remedies infringing this independence of the states—though they might otherwise be given—should be withheld if sought on slight or inconsequential grounds. *Di Giovanni v. Camden Ins. Assn.*, *supra*, 73; *Matthews v. Rodgers*, 284 U.S. 521, 525-26; cf. *United States ex rel. Kennedy v. Tyler*, 269 U.S. 13; *Massachusetts State Grange v. Benton*, 272 U.S. 525.

“ . . . Where the *threatened prosecution* is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury ‘both great and immediate.’ *Spielman Motor Co. v. Dodge*, 295 U.S. 89, 95, and cases cited; *Beal v. Missouri Pacific R. Corp.*, 312 U.S. 45, 49, and cases cited; *Watson v. Buck*, 313 U.S. 387; *Williams v. Miller*, 317 U.S. 599.

"The trial court found that respondents had prosecuted certain of petitioners and other Jehovah's Witnesses for distributing the literature described in the complaint without having obtained the license required by the ordinance, and had declared their intention further to enforce the ordinance against petitioners and other Jehovah's Witnesses. But the court made no finding of *threatened irreparable injury* to petitioners or others, and we cannot say that the declared intention to institute other prosecutions is sufficient to establish irreparable injury in the circumstances of this case.

"Nor is it enough to justify the exercise of the equity jurisdiction in the circumstances of this case that there are numerous members of a class *threatened with prosecution* for violation of the ordinance. . . ."

319 U.S. 157, 159-165

As is to be expected, there is no mention of 28 U.S.C. sec. 379, for relief was not sought against any proceeding pending in a state court.

Furthermore, an examination of the cases referred to by the District Court in its rulings in this case as well as in the *Hall* case has failed to reveal a single case where an injunction issued by a federal court against a criminal prosecution pending in a state court has been sustained. And in view of the cases discussed on pages 24 to 27 of this brief, any such decision would hardly be persuasive. One of the cases examined, *Truax v. Raich*, 239 U.S. 33, 36 S. Ct. 7, seemed to be at variance with the rule, for a preliminary injunction against a pending prosecution in a state court was sustained. Nevertheless, the case is in line with the other cases, as an examination of the facts will show. The explanation for the apparent departure



lies in the fact that the prosecution was commenced after the filing of the equity suit, which was brought to restrain threatened prosecutions. 239 U.S. 33, 36. In the opinion of the three-judge court which granted a preliminary injunction, *Raich v. Truax*, 219 Fed. 273, 284 (D.C. Ariz., 1915), the reason is given as follows:

“In the case at bar the court acquired jurisdiction before any criminal proceedings were instituted against the defendant Truax, and should under the rule in *Ex parte Young*, *supra*, maintain its jurisdiction to the exclusion of all criminal proceedings instituted against Truax in the state courts.”

The case resembles *Looney v. Eastern Texas R. R.*, 247 U. S. 214, 38 S. Ct. 460, where a state court proceeding was also enjoined. There the state court proceeding was instituted not only after the federal suit was filed but in the face of a temporary injunction previously issued by the federal court against such a suit. The case is discussed and explained in the Court's opinion in the *Toucey* case, 314 U. S. 118, 138, as an instance of a federal court protecting its jurisdiction until determination of the original suit brought before it. Such cases are obviously distinguishable from the instant case and the other cases where the prohibition of section 379 has applied.

## 2. REQUIREMENTS FOR INJUNCTION AGAINST THREATENED PROCEEDINGS

The quotations from *Douglas v. Jeannette*, *supra*, in the preceding section of this brief show that federal courts have jurisdiction in equity to enjoin threatened criminal prosecutions in the state courts under allegedly unconstitutional statutes only in those cases where it is necessary “to prevent irreparable injury which is

clear and imminent" (319 U. S. 157, 163), or, as stated elsewhere in the opinion, "only on a showing of danger of irreparable injury 'both great and imminent' " (p. 164). In *Watson v. Buck*, 313 U. S. 387, 61 S. Ct. 962, plaintiffs were denied relief in an action brought to restrain enforcement of a Florida statute forbidding combinations of musical composers, publishers and owners of copyrighted compositions on the ground that there was no showing of a threat of enforcement. The Court said (313 U. S. 387, 400) :

" . . . The imminence and immediacy of proposed enforcement, the nature of the threats actually made, and the exceptional and irreparable injury which complainants would sustain if those threats were carried out are among the vital allegations which must be shown to exist before restraint of criminal proceedings is justified. . . ."

Again in *Beal v. Missouri P. R. Corp.*, 312 U. S. 45, 61 S. Ct. 418, an action brought to enjoin enforcement of a Nebraska "full train crew" statute was dismissed for want of equity jurisdiction even though there were allegations of a multiplicity of threatened prosecutions and a liability for large fines as a consequence of such prosecutions. The Court pointed out that there was no showing that more than one prosecution was threatened or that the penalties would be so large as to prevent recourse to the courts for adjudication of plaintiff's rights under the statute. In *Spielman Motor Co. v. Dodge*, 295 U. S. 89, 55 S. Ct. 678, an action to enjoin threatened prosecution under a New York statute regulating motor vehicle dealers was dismissed for want of equity jurisdiction on the ground that the plaintiffs failed to show " 'danger of irreparable loss . . . both great and immediate' ." 295 U.S. 89, 95. The Court pointed out further that the plaintiffs should set up

their defense in the state courts, with ultimate review in the United States Supreme Court. In *Fenner v. Boykin*, 271 U. S. 240, 46 S. Ct. 492, a suit to enjoin threatened enforcement of a Georgia statute prohibiting dealings in cotton futures was dismissed for similar reasons. The rule likewise applies to threatened civil suits, as is shown in *Cavanaugh v. Looney*, 248 U. S. 453, 39 S. Ct. 142, where a suit to enjoin the institution of condemnation proceedings authorized by a Texas statute was held to lack grounds for equitable jurisdiction for similar reasons. In each of these cases a suit for injunction brought in the federal court against threatened proceedings in a state court was dismissed for lack of equity. The basis for the rule lies in the fact that the state courts are as bound by the Constitution of the United States as are the federal courts and that all defenses against an unconstitutional statute are available to and may be presented by the party in the state court.

These cases further hold that the incidental injury attendant upon a criminal prosecution is not such an irreparable injury as constitutes ground for equitable intervention, for no one is free from prosecution in good faith. The District Court, however, ruled that the rule should not apply in a case brought under the First Amendment. Yet it was in *Douglas v. Jeannette*, *supra*, a leading civil rights case, in which the rule was but recently restated:

“It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute



or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S. 207; *Fenner v. Boykin*, 271 U. S. 240. . . .”

319 U. S. 157, 163

Other civil rights cases in point are *Bevins v. Prindable*, 39 F. Supp. 708 (D.C.E.D. Ill., 1941), *aff'd* 314 U. S. 573, 62 S. Ct. 112; *Keegan v. New Jersey*, 42 F. Supp. 922 (D.C.N.J. 1941); *United Electrical R. & M. Workers v. Baldwin*, 67 F. Supp. 235 (D.C. Conn., 1946); *Atlantic Fishermen's Union v. Barnes*, 71 F. Supp. 927 (D.C. Mass., 1947). Underlying the reluctance on the part of federal courts to take jurisdiction of matters in the state courts is the realization, expressed in *Fenner v. Boykin*, 271 U. S. 240, 244, 46 S. Ct. 492, that “an intolerable condition would arise if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some federal court.”

Here there has been but one prosecution, and that pending at the time the instant case was filed, and never any threat of other prosecutions. Under the foregoing authorities, there was no basis, it is respectfully submitted, for equitable intervention in this case.

#### *D. Jurisdiction against Judges and Public Officers*

Another jurisdictional objection in this case lies in the fact that this action was brought against the judge of a circuit court, a court of general jurisdiction, of the Territory of Hawaii and against the attorney general of the Territory, its chief law enforcement officer, in their respective official capacities. The objection is based on fundamental principles which cannot be disregarded without far-reaching consequences to the administration of justice in the Territory.

## 1. NO JURISDICTION AGAINST COURTS AND JUDGES

In appellees' objections to the allowance of a preliminary injunction, their first pleading in this case, it was contended that the District Court was without jurisdiction to issue an injunction against the judge of a circuit court of the Territory. (Rec. p. 52) The contention was repeated in their answer (Rec. p. 79) and is maintained in this appeal.

This objection goes back to the historical origins of equity, to which it is traced in Maitland on Equity (2d ed. rev. 1936), at page 9:

"... it [Court of chancery] never presumed to send to them [courts of law] such mandates as the Court of King's Bench habitually sent to the inferior courts, telling them that they must do this or must not do that or quashing their proceedings—the Chancellor's injunction was in theory a very different thing from a mandamus, a prohibition, a certiorari, or the like. It was addressed not to the judges, but to the party. . . ."

And it applies in the relations between federal courts and state courts, as said in Taylor and Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 Yale Law Journal 1169, 1185:

"... Moreover, considered purely as a matter of general chancery practice, apart from any considerations peculiar to the relation between states and federal courts, it has long been settled that an injunction against court proceedings should always issue against the plaintiff, never against the judge before whom the cause is being tried. Even during the reign of James the First, when the conflict between law and equity was most bitter, the chancellors did not presume to exercise the injunctive power against the judges themselves."

That this historical limitation is part of the law of equity in this country is shown by the opinion of the Court in *Ex parte Young*, 209 U. S. 123, 163, 28 S. Ct. 441:

“It is proper to add that the right to enjoin an individual, even though a state official, from commencing suits under circumstances already stated, does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature, nor does it include power to prevent any investigation or action by a grand jury. The latter body is part of the machinery of a criminal court, and an injunction against a state court would be a violation of the whole scheme of our Government. If an injunction against an individual is disobeyed, and he commences proceedings before a grand jury or in a court, such disobedience is personal only, and the court or jury can proceed without incurring any penalty on that account.

“The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction is plain, and no power to do the latter exists because of a power to do the former.”

The rule is one of general acceptance, as is indicated by the foregoing and other authorities, such as *Arrow-smith v. Gleason*, 129 U. S. 86, 98, 9 S. Ct. 237; 1 High on Injunctions (4th Ed.) pp. 62-63; 4 Pomeroy's Equity Jurisprudence (5th Ed.) p. 974; 28 Am. Jur. 381-382. But being of such a fundamental and elementary nature, it seldom enters into the decision of a case.

While it is true that in the instant case the District Court did not at any time restrain the appellee Circuit Judge, it is submitted the Court was in error in assum-



ing and retaining jurisdiction over the appellee Circuit Judge in this, a suit for an injunction. In support of its ruling, the Court cited the case of *Picking v. Pennsylvania R. Co.*, 151 F. 2d 240, 250 (C.A. 3d, 1945). (Rec. p. 323) The question involved in that case, so far as it is pertinent on this point, was whether a justice of peace who was alleged to have denied and refused a hearing to plaintiffs upon their arrest and to have conspired with other defendants to deprive plaintiffs of their liberty without due process of law, could be held answerable in damages under the Civil Rights Acts. The Court held that the common law privilege of judicial officers was abrogated by the Acts and that therefore it was error to dismiss the complaint as to the justice of peace. Be that as it may, there is no resemblance between the facts of that case and the instant case. The action complained of in the instant case, purportedly "fully described" in the complaint (Rec. pp. 6, 15), was the issuance of a temporary restraining order regulating picketing during a strike and the bringing of plaintiffs to trial on a criminal contempt charge for a violation of the order. There is no allegation of a conspiracy by the appellees, or an abuse of office or other malicious action on the part of the appellees, and indeed there could be none.<sup>1</sup> A case more like the instant case is the situation covered by the alternative ground of decision in *United States v. United Mine Workers*, 330 U. S. 258, 67 S. Ct. 677, where the Supreme Court held that assuming the District Court acted in excess of its jurisdiction in issuing the temporary restraining order enjoining the miners' strike, nevertheless a violation of such order pending

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<sup>1</sup>But compare the statement on page 13 of the opening brief, previously discussed on page 6 of this brief.

the determination of the question of the Court's jurisdiction constituted criminal contempt.<sup>1</sup> An especially significant feature of the case is that Mr. Justice Frankfurter, who disagreed with the majority of the Court on the question of the District Court's jurisdiction under the Norris-La Guardia Act, joined in condemning the defendants for violating the order. If appellees in the instant case are subject to liability under the Civil Rights Acts, it would seem that in the situation of the alternative ground of decision in that case, United States District Judge Goldsborough and the Attorney General of the United States would likewise have been liable, if not civilly under 8 U.S.C. sec. 43, which is limited to action under color of state or territorial law, at least criminally under 18 U.S.C. sec. 52.<sup>2</sup> *Picking v. Pennsylvania R. Co.*, *supra*, 151 F. 2d 240, 251, n. 12. It would seem unlikely, to say the least, that any court would hold those violating such an order guilty of criminal contempt, on the one hand, and the judge issuing the order liable in damages and even guilty of a crime, on the other.

## 2. LIMITATION ON JURISDICTION AGAINST PUBLIC OFFICERS

It is axiomatic that the state cannot be sued without its consent, and it is well established that the sovereign immunity may not be evaded by bringing a suit against a representative of the state where the state is the real party against which relief is sought, although not a part of record. 49 Am. Jur. 301-305. It is true, an officer of a state may be sued under certain circumstances. In *Ex parte Young*, 209 U. S. 123, 28 S. Ct. 441, it was held that the attorney general of a state

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<sup>1</sup>A fuller statement of the case is given on pages 63 to 64 of this brief.

<sup>2</sup>18 U.S.C. sec. 242, effective September 1, 1948.

may be sued for injunctive relief if the statute under which he proposes to act is unconstitutional. The principle underlying this rule is that the officer cannot use the name of the state where there is no constitutional statute upon which to base his action,<sup>1</sup> On the same line of reasoning, if the proposed action complained of is the prosecution of a criminal contempt proceeding, the question would be whether there is an order such as would sustain such proceeding. If not, he should be subject to restraint as he would be in case he were acting under an unconstitutional statute. However, if there is such an order, it should follow that he would be acting as the representative of the state and therefore not subject to restraint.

The Territory comes within the rule of sovereign immunity. *Kawananakoa v. Polyblank*, 205 U. S. 349, 27 S. Ct. 526. The foregoing rules, accordingly, apply to the Territory. In the instant case, plaintiffs have sought to enjoin appellee Attorney General from prosecuting a criminal contempt case. Suit has been brought against the officer in his official capacity and the Territory has not been named a party herein. But the proceeding which the plaintiffs seek to enjoin is in effect an action brought by the Territory against

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<sup>1</sup>The distinction is illustrated in *Ex parte La Prade*, 289 U.S. 444, 53 S. Ct. 682, where a suit brought against the attorney general of Arizona to restrain threatened enforcement of a statute was dismissed as against his successor because it was not shown that the successor personally threatened enforcement. Compare the situation in the instant case where there have been two changes in office, as noted on page 6 of this brief.



the plaintiffs herein.<sup>1</sup> (Rec. pp. 32-40, 357-364) Hence, the substance of the relief sought is restraint of the Territory. Under the rule of sovereign immunity, relief cannot be had in such a case.

It is alleged by the appellents that appellee is acting under an invalid order and it would be argued, of course, that therefore he is stripped of his office and may be sued as an individual. But the *United Mine Workers* case, discussed in the preceding section of this brief, shows that even an order issued in the excess of jurisdiction is valid and enforceable pending the determination of the question of the court's jurisdiction, and that the violation of such an order constitutes criminal contempt notwithstanding that it may be later determined to have been issued in excess of jurisdiction. *A fortiori*, an order subject merely to constitutional infirmity, as distinguished from a jurisdictional defect, would sustain contempt proceedings. In *Howat v. Kansas*, 258 U. S. 181, 42 S. Ct. 277, long before the *United Mine Workers* case, it was established that an order issued by a court having jurisdiction must be obeyed regardless of the constitutionality of the statute upon which the order is based.<sup>2</sup> The following passage from the *United Mine Workers* case (330 U. S. 258, 293-294) shows the relationship of the two rules:

“Proceeding further, we find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is

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<sup>1</sup>The nature of criminal contempt proceedings is discussed in the answering brief of appellee Wirtz in *ILWU v. Wirtz*, *supra*.

<sup>2</sup>The case is more fully discussed on pages 64 to 65 of this brief.

reversed by orderly and proper proceedings. This is true without regard even for the constitutionality of the Act under which the order is issued. In *Howat v. Kansas*, 258 U. S. 181, 189-90 (1922) this Court said:

“‘An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.’”

Violations of an order are punishable as criminal contempt even though the order is set aside on appeal, *Worden v. Searls*, 121 U. S. 14 (1887), or though the basic action has become moot, *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418 (1911).

“We insist upon the same duty of obedience where, as here, the subject matter of the suit, as well as the parties, was properly before the court; where the elements of federal jurisdiction were clearly shown; and where the authority of the court of first instance to issue an order ancillary to the main suit depended upon a statute, the scope and applicability of which were subject to substantial doubt. The District Court on November 29 affirmatively decided that the Norris-LaGuardia Act was of no force in this case and that injunctive relief was therefore authorized. Orders outstanding or issued after that date were to be

obeyed until they expired or were set aside by appropriate proceedings, appellate or otherwise. Convictions for criminal contempt intervening before that time may stand."

Inasmuch as the order upon which the pending criminal contempt case is based is a valid order for the purposes of the contempt case, appellee Attorney General is acting in his official capacity and is not subject to and may not be enjoined.

It is respectfully submitted that the retention of jurisdiction over the appellees in the instant case was inconsistent with the fundamental principles herein discussed.

#### *E. Abstention in matters of local concern*

A salutary principle governing the exercise of jurisdiction by federal courts is that the federal courts will leave the determination of matters of local law or local concern to the local courts and will follow the decisions of the local courts in such matters. The controlling rule is that "in so far as the decisions of the Supreme Court of Hawaii are in conformity with the Constitution and applicable statutes of the United States and are not manifestly erroneous in their statement or application of governing principles, they are to be accepted as stating the law of the Territory." *Waialua Co. v. Christian*, 305 U.S. 91, 109, 59 S. Ct. 21. See also *United States v. Fullard-Leo*, 331 U. S. 256, 269, 67 S. Ct. 1287; *Lewers & Cooke v. Atcherly*, 222 U. S. 285, 294, 32 S. Ct. 94; *Kealoha v. Castle*, 210 U. S. 149, 154, 28 S. Ct. 684; *Ewa Plantation Co. v. Wilder*, 289 Fed. 664, 669 (C.A. 9th, 1923). Applying the principle in the instant case, the District Court declined in its final decision to determine whether the alternative ground of decision in the *United Mine Workers* case applied



in the Territory.<sup>1</sup> (Rec. p. 340) But, if the matter is one for the territorial courts to decide, it would seem to follow that there was no occasion for the District Court to consider the question of whether the order challenged in the instant case was within the jurisdiction of the court issuing it or whether it was in contravention of any federal statute or the Constitution. If the territorial courts should choose to follow the rules of the *United Mine Workers* case and *Howat v. Kansas*, discussed in the preceding section of this brief (pages 41, 44), the plaintiffs in the instant case would be liable for criminal contempt regardless of such questions. The point is, if it is for the territorial courts to decide to follow such precedents, and there is every reason to expect them to do so, there is no basis for intervention by a federal court and accordingly the pending contempt proceedings in question in the instant case should be permitted to proceed without interference.

## II. MERITS OF THE CAUSE

Appellees have argued at length that applicable statutory and judicial limitations precluded the exercise of jurisdiction by the District Court in the instant case. Of course, for the purpose of determining whether the complaint stated a cause of action upon which the court could grant relief, the Court rightly assumed jurisdiction. *Westminster School Dist. of Orange County v. Mendez*, 161 F. 2d 774, 778 (C.A. 9th, 1947). But, appellees contend, upon assuming juris-

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<sup>1</sup>Contrary to the indication in the District Court's opinion (Rec. p. 340), it was contended in the answering brief of appellee Wirtz (pp. 8-10) in *ILWU v. Wirtz, supra*, that the local decisions were not in conflict with the rule of the *United Mine Workers* case.

diction to determine its power to grant relief, the Court should have denied relief on the basis of such jurisdictional limitations. Over appellees' objections, the Court nevertheless proceeded to a consideration of the merits of the four counts alleged in the complaint. Inasmuch as the appeal is taken primarily from the rulings on the merits, appellees deem it necessary to submit a brief statement in support of the Court's rulings. Assuming, then, for the purposes of argument that the merits of the counts were in issue, which appellees deny, appellees submit that the rulings were correct.

The gist of the several counts has been previously stated (page 18 of this brief) as follows:

1 That the circuit courts of the Territory are *courts of the United States* within the meaning of the Norris-La Guardia Act and subject to its jurisdictional limitations; that the order complained of was issued in violation of such limitations and was therefore void.

2 That under the Norris-La Guardia Act, the United States District Court for Hawaii has exclusive jurisdiction to issue injunctions in labor disputes in the Territory; that any injunction issued by a circuit court of the Territory would accordingly be void.

3 That the Norris-La Guardia and Clayton Acts created certain substantive rights of labor; that the order in question violated such rights and was therefore void.

4 That the order in question contravened the rights of freedom of speech and peaceful assembly guaranteed by the Constitution.

The first count is the same as the issue in *ILWU v. Wirtz*, which was decided by this Court on September 27, 1948, and is controlled by that decision. The sec-

ond count is also controlled by the decision in *ILWU v. Wirtz*. It may be added that appellants cite no authority in support of their theory and that the same theory has been rejected in the three cases in which it has been considered to our knowledge, to wit, in the instant case (Rec. pp. 63, 321), *Carras v. Monaghan*, 65 F. Supp. 658, 662 (D.C.W.D. Pa., 1946) and *United Electrical, R. & M. Workers v. Westinghouse El. Corp.*, 65 F. Supp. 420, 422 (D.C.E.D. Pa., 1946). See also *Brown v. Coumanis*, 135 F. 2d 163, 164 (C.A. 5th, 1943). The third and fourth counts are thoroughly discussed in the brief of *amicus curiae* in this case. We have examined the final draft of said brief and found that we are in agreement with the argument of *amicus*. We therefore wish to be permitted to adopt his brief, especially the argument on the third and fourth counts. In addition, we wish to submit a brief comment on the third count and a statement supplementing, and partly duplicating, the argument of *amicus* on the fourth count, the constitutional issue.

In the third count, appellants submit the same theory of substantive rights which was offered by the appellants in *ILWU v. Wirtz*. It was discussed in the appellants' opening brief in that case on pages 74-82 and in the answering brief of Maui Agricultural Company on pages 60-93, although as pointed out in the latter brief, the question was not properly in issue. This theory is but another attempt to apply an Act of Congress dealing with the jurisdiction of federal courts to the territorial courts. The underlying argument is that since Congress has the power to legislate for the Territory, it must have done so. Such an argument entirely disregards the rule of *Inter-Island Co. v. Hawaii*, 305 U.S. 306, 312, 59 S. Ct. 202, that



an intention to supersede the local law of the Territory is not to be presumed. Congress was not legislating for the Territory in enacting the Norris-La Guardia Act. *ILWU v. Wirtz, supra.*

#### A. *The Constitutional Issue*

The constitutional issue in this case is whether the order issued by appellee Circuit Judge was in violation of the right of peaceful picketing which is derived from the First Amendment. In order that the issue may be properly considered, it is necessary to determine what is the nature of the right. It is to be noted that so far as the constitutional issue is concerned, the Territory is in the same position as the United States or the states, for the same right obtains against all three. Hence, our territorial status is immaterial in this consideration. Following the discussion on the nature of the right, the order in question will be briefly considered.

#### 1. PICKETING A QUALIFIED RIGHT—THE RULE OF DRIVERS UNION V. MEADOWMOOR CO.

The nature of the right to picket peaceably is, of course, to be determined from the decisions of courts, particularly those of the United States Supreme Court, for the Constitution does not mention such a right. In the brief of *amicus curiae* pages 15 to 22, the pertinent Supreme Court decisions are traced in chronological order and two of the most important cases for the purpose of this case are discussed at length. Even though there will be duplication, appellees desire briefly to review a few of those cases. *Thornhill v. Alabama*, 310 U.S. 88, 60 S. Ct. 736, decided in 1940, was the first of the cases sustaining the right to picket on a constitutional basis. Upon an

appeal from a conviction under an Alabama anti-picketing statute, the statute was held invalid because it was too broad, the statute having prohibited all picketing irrespective of the nature of the picketing, peaceful or otherwise. The picketing for which the defendant was prosecuted was of a peaceful nature and no violence was involved. The Court took pains, however, to point out that the right to picket is not an absolute, unqualified right:

“ . . . We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger. Compare *American Foundries v. Tri-City Council*, 257 U. S. 184, 205. . . .”

310 U. S. 88, 105.

Although dictum, its significance lay in the fact that it qualified the right to picket in the very case in which the right was first given effect. And it was not long before the dictum became law, for the next case in the Supreme Court was *Drivers Union v. Meadowmoor Co.*, 312 U.S. 287, 61 S. Ct. 552, decided the following year.

Like the *Thornhill* case, the *Drivers Union* case came to the Supreme Court through the state courts. The company filed a suit in equity in Illinois against the union to enjoin picketing of stores where the company's products were sold. A restraining order issued, enjoining all union conduct, peaceful as well as violent, and the case was referred to a master. The master found that considerable violence had occurred and recommended that all picketing be enjoined. The trial court enjoined only the violence and permitted peaceful picketing. Upon appeal, the state supreme

court reversed the trial court and ordered that the injunction prohibit all picketing. Upon appeal to the United States Supreme Court, the action of the state supreme court was affirmed. The Court held that the states have power, by the use of equity powers vested in the courts, to prevent violence, and where picketing has been enmeshed with violence, the courts have power to enjoin all picketing for the purpose of preventing its recurrence. The Court squarely held that the Constitution does not preclude the exercise of injunctive powers against picketing:

“ . . . Nor can we say that it was written into the Fourteenth Amendment that a state through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct. . . .

“ . . . A state may withdraw the injunction from labor controversies but no less certainly the Fourteenth Amendment does not make unconstitutional the use of the injunction as a means of restricting violence. We find nothing in the Fourteenth Amendment that prevents a state if it so chooses from placing confidence in a chancellor’s decree and compels it to rely exclusively on a policeman’s club.”

312 U. S. 287, 294-295

Unlike the *Thornhill* case, which related to the validity of a general statute, this case involved a specific injunction. The dictum of that case was nevertheless held to be equally applicable to an injunction as to a properly drawn statute:

“We do not qualify the *Thornhill* and *Carlson* decisions. We reaffirm them. They involved statutes baldly forbidding all picketing near an employer’s place of business. Entanglement with violence was expressly out of those cases. The statutes



had to be dealt with on their face, and therefore we struck them down. Such an unlimited ban on free communication declared as the law of a state by a state court enjoys no greater protection here. *Cantwell v. Connecticut*, 310 U. S. 296; *American Federation of Labor v. Swing*, *post*, p. 321. But just as a state through its legislature may deal with specific circumstances menacing the peace by an appropriately drawn act, *Thornhill v. Alabama*, *supra*, so the law of a state may be fitted to a concrete situation through the authority given by the state to its courts. This is precisely the kind of situation which the *Thornhill* opinion excluded from its scope. 'We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger . . . as to justify a statute narrowly drawn to cover the precise situation given rise to the danger.' 310 U. S. 105. We would not strike down a statute which authorized the courts of Illinois to prohibit picketing when they should find that violence had given to the picketing a coercive effect whereby it would operate destructively as force and intimidation. Such a situation is presented by this record. It distorts the meaning of things to generalize the terms of an injunction derived from and directed towards violent misconduct as though it were an abstract prohibition of all picketing wholly unrelated to the violence involved."

312 U. S. 287, 297-298.

The *Drivers Union* case established beyond doubt that the right to picket is not an absolute or unqualified right, but that it may not only be regulated but even forfeited under certain circumstances. Subsequent decisions show that the right is subject to other limitations. Thus, where the purpose of the picketing is not legitimate, an injunction restraining peaceful picketing will likewise be upheld. *Carpenters Union v.*

*Ritter's Cafe*, 315 U. S. 722, 62 S. Ct. 807 (1942). There an injunction was sustained under the following circumstances. Ritter, who was engaged in the restaurant business, was putting up a new building, which was to have no connection with the restaurant. The contractor who was engaged in the work employed non-union men. For the purpose of inducting Ritter to require the contractor to employ union men, the union picketed Ritter's restaurant. Under such circumstances, it was held that the picketing was lawfully enjoined.<sup>1</sup> The Court made the following observation:

“. . . But the circumstance that a labor dispute is the occasion of exercising freedom of expression does not give that freedom any greater constitutional sanction or render it completely inviolable.”

315 U.S. 722, 725

Also indicating the qualified nature of the right to picket is *Allen Bradley Local v. Board*, 315 U.S. 740, 62 S. Ct. 820, wherein an order of the Wisconsin Employment Relations Board prohibiting mass picketing, threatening of employees desiring to work, obstructing points of ingress and egress and streets and highways, and picketing of employees' homes, was held not to be in conflict with the Norris-La Guardia Act and was sustained as a valid exercise of the state police power.

The *Drivers Union* case is, of course, the leading case on the effect of violence and other unlawful conduct on the right to picket. Following it is a considerable line of federal and state cases, a number of which have been cited in the brief of *amicus* (pp. 23-26). Additional authorities include: *Steiner v. Long*

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<sup>1</sup>However, in another secondary picketing case, the injunction was not upheld. *Bakery Drivers Local v. Wohl*, 315 U.S. 769, 62 S. Ct. 816 (1942).

*Beach Local*, 19 Cal. 2d 676, 123 P. 2d 20 (1942); *People v. Saffel*, 74 Cal. App. 2d 967, 168 P. 2d 497 (1946); *Westinghouse Elec. Corp. v. United E. R. & M. Workers*, 139 N. J. Eq. 97, 49 A. 2d 896 (1946); *United States El. Motors v. United E. R. & M. Workers*, 166 P. 2d 921 (L.A., Cal., Super. Ct., 1946); *Carras v. Monaghan*, 65 F. Supp. 658 (D.C. Pa., 1946).

Each of these cases is worthy of note. The *Steiner* case was a suit for an injunction to enjoin picketing and boycotting which had been carried on by the union, attended by some violence and intimidation of plaintiffs' employees and their families. A blanket injunction prohibiting all picketing and boycotting was issued. Although upon appeal the injunction was modified to permit picketing other than at plaintiff's plant and the places where violence had occurred, the California Supreme Court expressly adopted and followed the rule of the *Drivers Union* case as the law of the state. The Court further stated that extreme physical violence was not necessary to bring a case within the rule, abusive language, threats of violence, intimidation and the like being enough. In the *Saffel* case, the rule was applied directly in a criminal case charging contempt of court for violation of an order regulating picketing. It was held that the mere allegation in the complaint that the order in question was "a lawful order" "imports that the order was made on such a state of facts as would render it lawful." (168 P. 2d 497 at 507) The Court was referring to the rule of the *Drivers Union* and *Steiner* cases, which it recognized as the law of the state in overruling a demurrer to the charge.

The New Jersey case of *Westinghouse Elec. Corp. v. United E. R. & M. Workers*, *supra*, was, like the *Steiner*



case, a suit to enjoin picketing. Two restraining orders and a preliminary injunction were issued, which prohibited picketing for the purpose of preventing egress and ingress and massing at gates to plaintiff's plant; required pickets around the plant to be ten feet apart; limited pickets on streets about the plant to twenty-five pickets and pickets at plant entrances to five pickets; and further prohibited violence, coercion, intimidation, assembling at certain points and obstructing of streets and sidewalks. It was contended for the defendants that since there had been no acts of violence, picketing could not be regulated. It was found that there had been no acts of serious violence. The case also involved a question of the effect of the state anti-injunction law. The case squarely involved the question of whether in the absence of violence, picketing can be restrained consistently with the Constitution of the United States and the state anti-injunction law. By a unanimous decision of eleven justices, the order of the Court of Chancery was affirmed on the ground that picketing which is used as a coercive measure is subject to regulation. Speaking of the "workingman's qualified right to picket", the Court held that factors other than violence, such as intimidation, coercion, duress, fraud and force, also operate to bar the right to picket:

"... It is stoutly urged for appellants that since the picketing employed by them was free from acts of violence, the restraints and injunctive relief granted trenched upon their constitutional right of free speech and assembly under the Fourteenth Amendment to our Federal Constitution. Cf. *Thornhill v. Alabama*, *supra*; *Carlson v. California*, 310 U.S. 106, 60 S. Ct. 746, 84 L. Ed. 1104; *Cafeteria Employees Union v. Angelos*, 320 U.S. 293, 64 S. Ct. 126, 88 L. Ed. 58. The argument is

not sound. It fails to recognize factors other than violence which operate to bar the working-man's qualified right to picket as a means of communication. Such other factors, for example, are that the picketing must be peaceful; that it must be free from intimidation, coercion, duress, fraud, and force; that it must, under the Anti-Injunction Act of our State, be, among other things, 'not in violation of any other law of this State.' . . ."

49 A. 2d 896, 904-905.

Both this case and the California case of *United States El. Motors v. United E. R. & M. Workers*, *supra*,<sup>1</sup> are valuable not only for the statement of the law but because of the similarity of the orders therein involved to that in the instant case.

Last but not least of those cases, for it is directly in point in the instant case, is *Carras v. Monaghan*, *supra*, which has been previously discussed on another point on page 23 of this brief. The case arose out of a suit for injunction brought by the union in federal court to enjoin the sheriff from enforcing an injunction issued by a state court which restricted picketing. Notwithstanding that the plaintiffs charged that the injunction infringed their rights of peaceful picketing and freedom of speech, the motion to dismiss was granted. The Court held that the exercise of injunctive powers in labor disputes does not violate constitutional rights. The court also rejected the contention that federal courts have exclusive jurisdiction in labor disputes, as previously noted on page 49 of this brief.

There are also many cases in which picketing, notwithstanding its peaceful character, has been enjoined because of the unlawful purpose for which it was car-

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<sup>1</sup>The case is briefly discussed on page 60, post.

ried on. While such cases are illustrative of the qualified nature of the right to picket, they are not analogous to the instant case and will be merely cited without discussion: *Fred Wolferman, Inc. v. Root*, 356 Mo. 976, 204 S.W. 2d 733 (1947), *cert. den.* 333 U.S. 837, 68 S. Ct. 608; *R. H. White Co. v. Murphy*, 310 Mass. 510, 38 N.E. 2d 685 (1942); *Saveall v. Demers*, Mass. , 76 N.E. 2d 12 (1947); *Markham & Callow v. International Woodworkers*, 170 Ore. 517, 135 P. 2d 727 (1943); *Swenson v. Seattle Central Labor Council*, 27 Wash. 2d 193, 177 P. 2d 873 (1947); *Retail Clerks' Union v. Wisconsin Employment Rel. Bd.*, 242 Wis. 21, 6 N.W. 2d 698 (1942).

## 2. ORDER IN INSTANT CASE

So far as can be determined from the complaint, the constitutional issue in this case is whether an order "denying plaintiffs the free exercise of their right to picket peacefully" is *per se* unconstitutional. (Rec. pp. 18-19) The complaint contains no specification of unconstitutionality. However, in the course of the protracted arguments in the case and without amendment of the complaint, it was revealed that plaintiffs were submitting the general question of the power of courts to regulate peaceful picketing and the more specific objections that the order in question was too broad, and also vague, ambiguous and confusing, and therefore invalid for such reasons, all of which the District Court took under advisement. (Rec. p. 329) The objection that the order was too broad was based on the representation, made in open court and repeated on pages 43-44 of the opening brief, that the membership of the ILWU totalled 100,000 members and that the property covered by the order included 12,472 acres and 20 company towns. The general question of the power of



courts to regulate picketing is not pressed in the opening brief. In fact, appellants state that "it may even be assumed that a Circuit Court of the Territory can, consistent with the Constitution, regulate mass picketing". (Op. Br. p. 44) Also, the contention that the order was void for ambiguity appears abandoned. The remaining objection is that the order unduly restricted peaceful picketing in view of the large number of persons affected and the territory covered by it. Appellants particularly complain of the provision limiting pickets at points of ingress and egress to three pickets.<sup>1</sup> Appellants also claim that "the means of free communication for hundreds of people living in company towns are denied." (Op. Br. p. 45)

If anything is clear from the foregoing cases in which restrictions on picketing were sustained, it is that obstruction and interference with ingress and egress may be prohibited and that picketing at places of ingress and egress may be regulated by prohibiting mass picketing and by limiting the number of pickets. For example, in *Westinghouse Elec. Corp. v. United*

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<sup>1</sup>Appellants construe such limitation as a definition of the term *mass picketing*. (Op Br. p. 44) Their reasoning seems to be as follows: Paragraph 7 of the order prohibits "mass picketing by assembling in compact groups or congregating in crowds on or near real property of the Petitioner . . . to thereby prevent or attempt to prevent or in any manner physically obstruct or interfere with ingress to or egress from said real property . . ." (Rec. p. 45); the succeeding paragraph limits "the number of pickets . . . to not more than three (3) pickets in a group at any point or station when stationed at points of ingress to and egress from the Petitioner's property . . ." (Rec. p. 46); therefore, mass picketing is any group in excess of three at any point of ingress and egress.

*E. R. & M. Workers, supra*, discussed on page 55 of this brief, the order prohibited massing at gates and limited pickets at entrances to the plant to five. In the *United States Electrical Motors* case, cited on page 55, the temporary restraining order prohibited mass picketing and limited the number of pickets at entrances to four pickets. The latter provision was vacated when it was shown to be unnecessary, but was restored in the preliminary injunction in modified form, the number being increased to ten. Other precedents are cited on page 27 of the brief of *amicus curiae*. While the specific provisions vary from case to case, as the circumstances require, the purpose of the regulations remains the same, namely, the prevention of breaches of the peace, the maintenance of law and order and the protection of the rights of others. It is obvious that inasmuch as the reasonableness of any limitation is relative to the circumstances of the particular case, it is a question which the court issuing the order is in the best position to determine. *Drivers Union v. Meadowmoor Co.*, 312 U.S. 287, 294, 61 S. Ct. 552.

The further complaint that the order denied the employees living in company towns the means of free communication is not justified by the order, nor by the facts. That and other objections as to the scope of the order are discussed in the brief of *amicus* at pages 30 to 32 and will not be treated in this brief.

One other matter that may be commented upon under the constitutional issue is the following statement on page 45 of the opening brief: "The restraint on free speech and assembly contained in the *ex parte* temporary restraining order and the indictment must be judged on their face . . ." That statement may be compared with the holding in *People v. Saffel, supra*,

discussed on page 55 of this brief, that in the criminal case in which contempt for violation of an order of court is charged, an allegation that the order was a *lawful order* will "import that it was issued under such a state of facts as would render it lawful". The *Saffel* case is supported by *Maggio v. Zeitz*, 333 U.S. 56, 68 S. Ct. 401, where it was held that the validity of a bankruptcy order cannot be retried in the contempt proceeding and wherein it is stated:

" . . . It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience. Every precaution should be taken that orders issue, in turnover as in other proceedings, only after legal grounds are shown and only when it appears that obedience is within the power of the party being coerced by the order. But when it has become final, disobedience cannot be justified by re-trying the issues as to whether the order should have issued in the first place. *United States v. United Mine Workers*, 330 U.S. 258; *Oriel v. Russell*, 278 U.S. 358. . . ."

333 U.S. 56, 69

Appellees respectfully submit, appellants' constitutional objections to the order in question are without substance, for the showing made in the *ex parte* hearing before appellee Circuit Judge, referred to on page 3 of this brief, clearly brought the case within the rule of the *Drivers Union* case.



*B. Effect of United Mine Workers case*

The final and foremost of appellees' several contentions against the complaint is that in the light of the alternative ground of decision of the *United Mine Workers* case, the merits of the several counts are entirely immaterial in determining whether plaintiffs are entitled to relief. This suit was brought to enjoin the prosecution of a criminal contempt proceeding which was brought to punish the wilful violation of an order of court. In such a case, the *United Mine Workers* case holds, the violation is punishable as a criminal contempt even though the court exceeded its jurisdiction in issuing the order and, *a fortiori*, regardless of the constitutionality of the order. More fully stated, the contention is:

The complaint fails to state a cause of action in that, as appears on the face of the complaint, the amended temporary restraining order issued in that certain equity action numbered 120, appended to the complaint, was issued by the Honorable Philip L. Rice, Judge of the Circuit Court of the Fifth Circuit, Territory of Hawaii, in the exercise of his powers as a circuit judge at chambers of the Territory of Hawaii.

That a circuit judge at Chambers of the Territory of Hawaii, pursuant to the Hawaiian Organic Act and the laws of the Territory of Hawaii, is a court of general jurisdiction with full equity powers and that its orders must be obeyed by persons subject to the jurisdiction of said court, until and unless set aside or reversed; that this is true whether or not the action of the court in issuing said amended temporary restraining order was erroneous; that the said Circuit Court has jurisdiction to determine its own jurisdiction, and that violations of its amended temporary restraining order constitute criminal contempt irrespective of

the ultimate disposition of the questions relating thereto raised herein by the plaintiffs' first and second causes of action, based on the Norris-La Guardia and Clayton Acts; that the said Circuit Court has jurisdiction to determine questions of constitutional law, with power to issue an *ex parte* order for the purpose of preserving rights alleged to be unlawfully invaded to the irreparable injury of the petitioners in the territorial court, pending the return on the order to show cause why an injunction should not issue; and that violations of the amended temporary restraining order issued by defendant constitute criminal contempt irrespective of the ultimate disposition of the questions raised herein by plaintiffs' third and fourth causes of action, based on the Norris-La Guardia and Clayton Acts and the Constitution of the United States.

Rec. pp. 79-80<sup>1</sup>

The *United Mine Workers* case, it will be recalled, was a suit brought in the District Court for the District of Columbia by the United States during the period of government operation of the soft coal mines for an adjudication to the effect that the defendant union and defendant John L. Lewis did not have power to terminate the agreement between the United States and the defendants. At the request of the government, a temporary restraining order was issued *ex parte*, in effect restraining the threatened strike. The strike having taken place, contempt proceedings were brought by the government. The defense to the contempt charge was that the court was without jurisdiction to issue the restraining order because of the limitations of the Norris-La Guardia Act and without jurisdiction to enforce such order. The contention

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<sup>1</sup>This is from appellees' answer.

was rejected by the court and upon trial defendants were found guilty of contempt, both criminal and civil. The case was appealed to the United States Supreme Court, which affirmed the judgment except to modify the fine imposed on the defendant union. A majority of the Court held that the Norris-La Guardia Act did not prohibit the granting of an injunction at the instance of the government. A different majority of the Court further held, as an alternative ground of decision, that even if the court exceeded its jurisdiction in issuing the order, nevertheless the violation of such an order pending the determination of the court's jurisdiction constituted criminal contempt and was punishable as such.

The opinion of the Court also referred to the case of *Howat v. Kansas*, 258 U. S. 181, 42 S. Ct. 277, where it was held that an injunction issued by a court having jurisdiction of the subject matter and the parties must be obeyed without regard for the constitutionality of the statute under which the order is issued. The *Howat* case arose in connection with the Kansas Industrial Relations Act, enacted 1920, which created an administrative tribunal to arbitrate controversies in certain essential industries and in effect provided for compulsory arbitration of labor disputes in such industries. In one case Howat and others were found guilty of contempt for violating a court order which was issued to compel them to testify before the administrative body and, in the other, Howat and members of the United Mine Workers were found guilty of violating an injunction issued at the instance of the attorney general to prohibit a threatened strike, which was alleged to be in violation of the Industrial Relations Act. In both cases the validity of the act was attacked by the de-



fendants. The state supreme court, upon appeal, held that regardless of the constitutionality of the law, the defendants were bound to obey the orders. While the writs of error to the United States Supreme Court in these cases were dismissed on the ground that no constitutional issue was involved, it is apparent that the Supreme Court approved the principle relied on by the state court.

The parallel between these cases and the instant case is too striking to warrant comment. Appellees submit that in view of the rule of these cases, there was no basis or occasion for intervention by the federal court. The same basic considerations, so well expressed in the opinion of Mr. Justice Frankfurter, require that the pending criminal contempt proceedings be prosecuted.

“. . . A majority of my brethren find that neither the Norris-La Guardia Act nor the War Labor Disputes Act limited the power of the district court to issue the orders under review. I have come to the contrary view. But to suggest that the right to determine so complicated and novel an issue could not be brought within the cognizance of the district court, and eventually of this Court, is to deny the place of the judiciary in our scheme of government. And if the district court had power to decide whether this case was properly before it, it could make appropriate orders so as to afford the necessary time for fair consideration and decision while existing conditions were preserved. To say that the authority of the court may be flouted during the time necessary to decide is to reject the requirements of the judicial process.

“It does not mitigate such defiance of law to urge that hard-won liberties of collective action by workers were at stake. The most prized liberties themselves presuppose an independent judiciary through which these liberties may be, as they often

have been, vindicated. When in a real controversy, such as is now here, an appeal is made to law, the issue must be left to the judgment of courts and not the personal judgment of one of the parties. This principle is a postulate of our democracy.

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“In our country law is not a body of technicalities in the keeping of specialists or in the service of any special interest. There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. Legal process is an essential part of the democratic process. For legal process is subject to democratic control by defined, orderly ways which themselves are part of law. In a democracy, power implies responsibility. The greater the power that defies law the less tolerant can this Court be of defiance. As the Nation’s ultimate judicial tribunal, this Court, beyond any other organ of society, is the trustee of law and charged with the duty of securing obedience to it.”

330 U. S. 258, 310-312

### III. PROCEDURE

There remain for consideration the procedural questions raised by appellants’ objections to the action of the District Court in denying their motion to strike and in sustaining appellees’ motion for determination of defenses before trial and to dismiss the action. [Rec. p. 379, par. (d)-(g)] The motion to strike was directed to one of the defenses in appellees’ answers,<sup>1</sup> summarizing the proceedings in the equity suit in the Circuit Court of the Fifth Circuit and incorporating as part thereof two exhibits, one of which was a certified copy

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<sup>1</sup>Although separate answers were filed, one merely adopted the other. (Rec. pp. 69-304, 305)

of the records and files of said equity proceeding and the other a certified copy of the transcript of the *ex parte* hearing upon which the order in question in the instant case was issued. (Rec. pp. 75-78, 81-245, 246-304) The motion to strike was based on the ground that such matters were "redundant, immaterial and impertinent". (Rec. pp. 309-310) The motion was denied by the Court without argument. (Rec. pp. 321, 343-344) The other motion in question was a motion filed by the appellees under Rule 12(d) of the Federal Rules of Civil Procedure, which provides that defenses enumerated in Rule 12(b) shall be heard and determined before trial unless ordered otherwise by the court. Appellees' answers included six defenses in law, five of which alleged a failure of the complaint to state a claim upon which relief could be granted, which is one of the defenses enumerated in Rule 12(b). (Rec. pp. 78-80) In addition to the determination of such defenses before trial, the motion asked for dismissal of the action. (Rec. pp. 306-308) During the hearings on said motion, which extended from August 26, 1947 to September 8, 1947, appellees filed another motion, under Rules 12 and 56, requesting that in ruling upon appellees' motion to dismiss, the Court take into consideration the entire record made by the pleadings, including the exhibits attached to the complaint and answers. (Rec. p. 312) In ruling on appellees' motions, the Court treated them as a motion for summary judgment and ordered the action dismissed. (Rec. pp. 320-321, 339, 343-344)

Appellants' argument on the motion to strike is that the proceedings in the equity suit are immaterial and irrelevant in determining the validity of the order in question and of the contempt charge predicated thereon because they must be judged on their face, appellants



contending, of course, that the order and charge are both void on their face. (Op. Br. pp. 16-18) But it has been previously shown in this brief (pp. 55, 61) that, on the contrary, in collateral proceedings involving an order of court, it will be assumed that the order was issued under such a state of facts as would render it valid. Perhaps it was "redundant, immaterial and impertinent" for the appellees to show that in this case such an assumption is in accord with the facts. Yet it could hardly be complained of as prejudicial error to the appellants if the appellees succeeded in their showing. It is submitted that the motion to strike was without merit, as well as untimely, as pointed out on page 6 of this brief.

Appellents' complaint of the disposition of the cause on appellees' motions is also not well taken. While the amendments to Rule 12, providing for the treatment of motions to dismiss for failure of the complaint to state a good claim under Rule 12(b) and motions for judgment on the pleadings under Rule 12(c) as motions for summary judgment, did not take effect until after the decision by the District Court, nevertheless the action of the Court was in line with the practice recognized in several of the circuits, particularly the Second Circuit, prior to the adoption of the amendments. Two cases showing the practice are cited in the Court's opinion (Rec. p. 320) and others are cited in the comment on the amendment in the Report of the Advisory Committee on Rules for Civil Procedure (June 14, 1946). A direct precedent for this case may be found in *Wawa Dairy Farms v. Wickard*, 56 F. Supp. 67 (D.C.E.D. Pa., 1944), *aff'd* 149 F. 2d 860 (C.A. 3rd, 1945), where in an action to review an order issued by the Secretary of Agriculture, a motion for summary judgment was granted on the basis of the

certified copy of the proceedings before the Secretary, which was incorporated as part of the answer. See also *Fields v. Hannegan*, 162 F. 2d 17 (C.A.D.C., 1947), *cert. den.* 332 U. S. 773, 68 S. Ct. 88.

The Court ruled that "if need be, the court may consider the exhibits attached to and made part of the pleadings of both parties." (Rec. p. 320) However, the Court first considered appellants' contention that the order in question was void on its face and ruled without resort to the exhibits that the order was not void. (Rec. pp. 333-338) The Court then proceeded to consider the record and transcript of evidence in the original equity suit and found that such proof was "a further reason for holding [the] Order valid." (Rec. p. 338) The Court thereupon concluded (Rec. p. 339) :

"So it is that upon the facts alleged—facts incidentally which do not support plaintiffs' argument that a conspiracy to deny plaintiffs their rights and to single them out for prosecution in order to intimidate others has been alleged in the complaint, and also as these facts are amplified by defendants' speaking motion—I find in point of law that plaintiffs' constitutional rights have not been invaded by the Amended Restraining Order.

"There being no genuine issues of fact remaining to be tried, summary judgment for the defendants may be entered."

In short, the Court first found that the complaint itself failed to state a claim for relief and further found from the entire record that there was no genuine issue as to any material fact and that on the undisputable facts as shown by the exhibits to the answer, appellees were entitled to judgment *as a matter of law*.

Plaintiffs complain that they were not offered an opportunity to controvert the exhibits attached to the

answers. Yet they did not at any time submit any affidavits controverting the record of the equity suit, if indeed they could impeach the record. On pages 20 to 21 of the opening brief, appellants list the facts they could have proved, all of which were repeatedly represented to the Court during the course of the extended oral arguments. The facts offered by the appellants were either immaterial or as a matter of fact taken into consideration by the Court anyway. The fact that only three of the appellants were employees of the Lihue Plantation Company, the petitioner in the original equity suit, and that the evidence in the equity suit did not connect any of the appellants with the events leading to the issuance of the order was immaterial, for the allegations of the complaint itself show that plaintiffs were all members of the ILWU (Rec. p. 6), which was enjoined by the order, and the allegations of the indictment, which was attached as an exhibit to the complaint, show that appellants all had knowledge and notice of the order. (Rec. pp. 35-36, 39) As a matter of law, appellants were therefore bound by the order. *People v. Saffel, supra*; 28 Am. Jur. 505; 43 C.J.S. 1009. As to their charges of denial of equal protection, the Court expressly found that the charges were not supported by the facts, assuming such charges to have been made in the complaint. (Rec. p. 339) "Suspicions are not sufficient to raise a genuine issue of fact." *Banco de Espana v. Federal Reserve Bank*, 28 F. Supp. 958, 973 (D.C.S.D.N.Y., 1939), *aff'd* 114 F. 2d 438 (C.A. 2d, 1940). As to the size and scope of the territory covered by the order, its application to company towns and the limitations of the order itself, the Court was fully aware of appellants' contentions and expressly took them into consideration. (Rec. pp. 329-339) Finally, as to the disqualification of appellee Circuit



Judge, any such contention would be in the face of the Hawaiian cases. *Ewa Plantation Co. v. Tax Assessor*, 18 Haw. 509; *Bruner v. Brewer*, 20 Haw. 617. The following language from *Sabin v. Home Owners' Loan Corp.*, 151 F. 2d 541, 542 (C.A. 10th, 1945), *cert. den.* 328 U. S. 840, 66 S. Ct. 1011, is most appropriate:

“The charge that the trial judge was disqualified . . . is too gauzy to present a substantial question. The motion for summary judgment was properly sustained.”

Appellants received every consideration from the Court. Not only were they given what seemed to appellees unlimited time to present their many contentions and theories, but also permitted much liberty in the course of argument in injecting and adverting to matters not disclosed by their pleading. It is submitted that the procedural aspects of the case are free of prejudicial error.

## CONCLUSION

In conclusion, appellees contend that the District Court was without jurisdiction to grant relief in this cause for the following reasons:

First, the provisions of 28 U.S.C. sec. 379 (28 U.S.C. sec. 2283, effective September 1, 1948) preclude the granting of an injunction to stay a proceeding pending in the circuit courts of the Territory.

Second, the complaint failed to establish a cause of action for equitable relief.

Third, no court of equity can enjoin another court or the judge thereof, nor can an action be maintained against an officer of the Territory when in substance it is a suit against the Territory.

Moreover, in the light of the *United Mine Workers* case, there was no occasion for the Court to consider the merits of the several counts.

But assuming *arguendo* that the merits of the cause were properly in issue, appellees submit that the ruling on the merits was correct and further that there was no prejudicial error in the procedural aspects of the case.

Accordingly, appellees respectfully submit that the judgment for appellees should be affirmed.

Dated at Honolulu, T. H., this 12th day of October, 1948.

Respectfully submitted,

WALTER D. ACKERMAN, JR., At-  
torney General, Territory of Hawaii  
and MICHIO WATANABE, Depu-  
ty Attorney General, Attorneys for  
Appellees,

By

*Michio Watanabe*

APPENDIX

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. . . the district courts shall have jurisdiction as follows: . . .

Twelfth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States to persons within the jurisdiction thereof.

Rev. Stat. sec. 563

. . . That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently, with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this



act or the act establishing a Bureau for the relief of Freedom and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the States wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.

Sec. 3 of Act of April 9,  
1866; 14 Stat. 27

. . . That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections six-

teen and seventeen hereof shall be enforced according to the provisions of said act.

Sec. 18 of Act of May 31,  
1870; 16 Stat. 144

. . . That any person who, under color of any law, statutes, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

Sec. 1 of Act of April  
20, 1871; 17 Stat. 13

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Rev. Stat. sec. 1979

#### §642. Jurisdiction of district court; authority of officers.

The said court shall have the jurisdiction of district courts of the United States, and shall proceed therein in the same manner as a district court; and the said judges, district attorney, and marshal shall have and exercise in the Territory of Hawaii all the powers conferred by the laws of the United States upon the judges, district attorneys, and marshals of district courts of the United States. (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838, Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; July 9, 1921, ch. 42, § 313, 42 Stat. 119.)

48 U.S.C. sec. 642<sup>1</sup>

#### § 645. Appeals.

Appeals from the said district court shall be had and allowed to the circuit court of appeals for the ninth judicial circuit in the same manner as appeals are allowed from district courts to circuit courts of appeal as provided by law, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, removal of causes, and other matters and proceedings as between the courts of the United

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<sup>1</sup>See page 77.



States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii. (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; July 9, 1921, ch. 42, § 313, 42 Stat. 119; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 936; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54.)

48 U.S.C. sec. 645<sup>2</sup>

<sup>1, 2</sup>Sec. 8 Section 86 of the Act approved April 30, 1900 (chapter 339, 31 Stat. 158; 48 U.S.C., secs. 641, 642, 643-645), as amended, is amended to read as follows:

“Sec. 86. The laws of the United States relating to removal of causes, appeals and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii.”

Sec. 8 of Act approved  
June 25, 1948 (Ch.  
646, P. L. 773, 80th  
Cong., 2d Sess.)

§ 52. (Criminal Code, section 20.) Depriving citizens of civil rights under color of State laws.

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subject, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution

and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000, or imprisoned not more than one year, or both. (Mar. 4, 1909, ch. 321, §20, 35 Stat. 1092.)

18 U.S.C. sec. 52  
(18 U.S.C. sec. 242,  
effective September  
1, 1948)

IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

CONSTANCIO R. ALESNA, JOSE BAGOGO BERNAL,  
DANIEL RODRIGUES FERREIRA, YUTAKA GO-  
HARA, CORNEL IHA, MASASHI KAGEYAMA,  
TOROICHI KANDA, FRANK GONSALVES PER-  
REIRA, NOBORU TAKEUCHI, FRED TANIGUCHI  
and GENKICHI WADA,

*Appellants,*

vs.

PHILIP L. RICE, as Judge of the Circuit Court  
for the Fifth Judicial Circuit of the Territory  
of Hawaii, and WALTER D. ACKERMAN, JR.,  
as Attorney General of the Territory of  
Hawaii,

*Appellees.*

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Upon Appeal from the United States District Court  
for the District of Hawaii

**APPELLANTS' REPLY BRIEF**

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APPENDIXES TO BRIEF OF APPELLATE  
AND APPELLATE

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# APPELLANTS' REPLY TO BRIEF OF APPELLEES AND AMICUS CURIAE

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IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CONSTANCIO R. ALESNA, JOSE BAGOGO BERNAL,  
DANIEL RODRIGUES FERREIRA, YUTAKA GO-  
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TOROICHI KANDA, FRANK GONSALVES PER-  
REIRA, NOBORU TAKEUCHI, FRED TANIGUCHI  
and GENKICHI WADA,

*Appellants,*

vs.

PHILIP L. RICE, as Judge of the Circuit Court  
for the Fifth Judicial Circuit of the Territory  
of Hawaii, and WALTER D. ACKERMAN, JR.,  
as Attorney General of the Territory of  
Hawaii,

*Appellees.*

Upon Appeal from the United States District Court  
for the District of Hawaii

## APPELLANTS' REPLY TO BRIEF OF APPELLEES AND AMICUS CURIAE

### APPELLEES' THEORY OF APPELLANTS' CASE

Counsel for the Employers Council and the Attorney General have pieced together for appellants a remarkable theory of their case. In their unanimous opinion appellants asked the court for relief against criminal contempt proceedings for violations of a perfectly reasonable, constitutional ex parte restrain-



ing order issued thoughtfully and justly by the appellee judge prohibiting the members of a local union and its officers, an international union,<sup>1</sup> and anybody acting in concert with them at or near the premises of the Lihue Plantation Company in the County of Kauai<sup>2</sup> from mass picketing or assembling or congregating in crowds larger than three at points of "ingress and egress." Appellees point out that at any place away from the scene of the labor dispute where nobody is going in to or coming from the employers' premises, the persons can picket to their hearts content, provided of course they remain ten peripatetic feet apart.<sup>3</sup>

Having thus disposed of the facts, procedurally they urge that a federal court does not have jurisdiction to restrain criminal prosecutions, or if it has jurisdiction, it should not exercise it because the appellants have a perfectly adequate remedy at law because they can stand trial before the appellee judge who after listening to their argument for four hours overruled all their contentions, and reaffirmed his order<sup>4</sup> and then appeal to the Supreme Court of the

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<sup>1</sup> 100,000 members throughout the Territory, continental United States and Canada; 5,000 members in Kauai County.

<sup>2</sup> 12,000 acres of land, many miles of company and publicly owned roads and 20 company towns and villages.

<sup>3</sup> This unrestricted right to picket away from the scene of the labor dispute seemed persuasive to the court below. (R. p. 336).

<sup>4</sup> Appellees conveniently omitted from their answer and return the portions of the transcript showing the challenge to the provisions of the ex parte order made before the appellee judge. For example, it was pointed out to the appellee judge in the hearing before him that in the course of giving the employer all the restraints asked for he had restrained the union from "making, uttering or circulating any false deceitful or untrue statements with reference to the Petitioner, its employment practices and its employees work-

Territory which has already ruled against them. But even if all this isn't quite so, they urge that it doesn't make any difference anyway because the Territory has a right to convict appellants for violations of an unlawful restraining order or even an ex parte order which violates the First Amendment.

So far as the procedure in the court below is concerned, they urge that the court was not obliged to give plaintiffs an opportunity to controvert their answer after their motion to strike it was heard and determined. The Attorney General points triumphantly to the fact that appellants' motion to strike was not filed within the twenty day period allowed by the rules which ended on August 10, 1947, but was filed twenty-one days after the answer. Of course this court has judicial knowledge that August 10, 1947 was a Sunday, and that therefore the motion to strike was timely.

The Attorney General also asserts that appellants are in error in stating that an appeal had been taken in the Wirtz case at the time the complaint in this case was filed on January 31, 1947. A written motion and notice of motion for continuance was filed by appellants before the appellee judge, requesting a continuance until final determination of *ILWU v. Wirtz* by this court, and served on the Attorney General. This motion stated that a notice of appeal

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ing therein, or others seeking to work therein" when the company had offered no evidence whatsoever that any statements of any kind, true or false, had been made." On reconsideration, on its own motion, after the extended argument, the court deleted this provision. Except for this the judge found nothing else objectionable about his order.

would be filed in the Wirtz case within 48 hours. The Attorney General opposed this motion at the hearing before the appellee judge on January 27, 1947. A written notice of appeal was filed in the Supreme Court in the Wirtz case on January 29, 1947. This suit was filed on January 31, 1947. Between the filing of the written notice of appeal and the signing of the order of appeal on February 21, 1947, counsel for appellants carried on a series of conferences with the Attorney General to work out a stipulation for summary of exhibits and the summary of exhibits. From the filing of the written motion to continue the hearings, the appellee judge and the Attorney General knew that an appeal in good faith was being prosecuted to this court from the ruling of the Territorial Supreme Court in the Wirtz case. As was stated in the opening brief the Attorney General had agreed that the Wirtz suit would be a test suit, and that it would be unnecessary to file similar proceedings against Judge Rice. Although in non-labor criminal cases, such as the test of the constitutionality of the territorial cattle-thieving statute which was appealed to this court, the appellee judge had stayed all cases while an appeal was prosecuted in one case only, he denied a stay of the criminal indictment against appellees for alleged violations of his order pending the Wirtz appeal.

### JURISDICTION

All of appellees' contentions about the jurisdiction of federal courts to hear and determine and grant injunctive relief in a case of the kind and char-



acter here presented have been authoritatively answered by the Supreme Court in *Hague v. CIO*, 307 U.S. 496, 59 S. Ct. 94, *A. F. of L. v. Watson*, 327 U.S. 582, 66 S. Ct. 761, *Douglas v. Jeannette*, 319 U.S. 157, 63 Sup. Ct. 877, *Terrace v. Thompson*, 263 U.S. 197, *Truax v. Raich*, 239 U.S. 33, 36 S. Ct. 7.

In *Screws v. United States*, 325 U.S. 91, 89 L. ed. 1484 the Supreme Court reviewed the whole history of the Civil Rights Acts. That case answers most of the contentions made by the appellees. The court determined that the Civil Rights Act deals with all federal rights and protects them "in lump" against infringement by state officers acting under color of law. It protects against all state officers who under color of law deprive persons of federal rights — the highest state officer to the most lowly is responsible for abuse of power by the state when that abuse infringes on a federal right. The principles of comity do not protect state officers who act in violation of federal rights. The cases dealing with the removal from state to federal courts and the strict showing required in those cases do not control where the allegation is abuse of power by state officers. The Civil rights Act affords civil and criminal relief against. All these questions were disposed of by the *Screws* case.

The Civil Rights Act has been held to abrogate the common law immunity of a judge acting in his judicial capacity. *Picking v. Pennsylvania*, 151 F. 2d. 240. And indeed, this must be so, for if any action by any officer, state or federal, which violates per-

sonal liberties is immunized, there is created a field for the exercise of arbitrary power which our form of government does not countenance. *Yick Wo v. Hopkins*, 118 U.S. 356; *Bell v. Hood*, 327 U.S. 788. In *Ex Parte Virginia*, 100 U.S. 339, a judge was indicted under the criminal counterpart of the section here invoked, and the Supreme Court denied his writ of habeas corpus.

Appellees urge that the so-called comity statute is jurisdictional. That it is not, has long been settled. Thus in *Smith v. Apple*, 264 U.S. 274, 479, 44 S. Ct. 311, 313, 68 L. ed. 678, the Supreme Court said of the section, "In short it goes merely to the question of equity in the particular bill."

In two cases entitled *ILWU, et al. v. Walter D. Ackerman, Jr. et al.*, Civil Nos. 828 and 836, in the Federal District Court for the Territory of Hawaii, a three-judge federal court on April 19, 1948 overruled a motion to dismiss in which the Attorney General made the same contentions as he now makes here. Those cases were brought, as is this case, under the civil rights act. Restraint against prosecutions under criminal statutes of the Territory alleged to be unconstitutional and in violation of the First Amendment was sought against local law enforcement officers who were prosecuting such charges.

The court below has twice overruled appellees' contentions in respect to the jurisdiction of the court to hear and determine the case and to grant the relief prayed. The dismissal of the action by the court below was on the ground that appellants had not in

fact been deprived of rights guaranteed by federal law or the constitution as alleged in the four counts of their complaint.

It is also clear from the opinion of the court below and from the foregoing authorities that plaintiff's complaint is sufficient to withstand a mere motion to dismiss and presents an appropriate case for the exercise of equitable jurisdiction if the appellants have been denied the federal and constitutional rights which they allege.

#### PROCEDURE

Appellants contend that the lower court erred in granting the motion to dismiss without affording appellants a hearing on their motion to strike a portion of appellees' answer and, after a ruling on that motion, affording appellants an opportunity to controvert the affidavits and other matter contained in the portions of the answer moved to be stricken, and to offer affidavits of their own in respect to the allegations of their complaint.

Appellees state that appellants' motion to strike was not timely. As previously pointed out the twentieth day after the answer fell on Sunday, August 10, 1947, and the motion to strike was filed on Monday, August 11, in compliance with the rules.

Appellees suggest that appellants did not controvert the matter contained in the answer. Under the rules the answer was deemed denied, and certainly appellants were not, in any event, bound to contro-



vert matter which they had moved to strike, prior to a ruling on that motion.

The lower court's action deprived appellants' of due process—that is, an opportunity to be heard on their motion to strike, and an opportunity to be heard in respect to the substance of the answer. The lower court's action was in violation of the Rules of Federal Procedure. Both the old and the new rules contemplate an opportunity to controvert before a motion to dismiss can be given the effect of a motion for summary judgment.

As clearly appears from the record, the portions of the answer which appellants moved to strike summarized in part, and printed in full, according to appellees' whim, the record before the appellee judge in the equity proceeding in the circuit court. Surely appellants were at least entitled to an opportunity to call attention to the missing parts. Surely they could "impeach" the record to this extent.

Appellees cavalierly argue that in any event since appellants contend that the *ex parte* order must be judged on its face, appellants cannot be harmed by any extraneous matter appellees chose to put in the record. They also urge that since the lower court dismissed the action because *as a matter of law*, as well as of fact, appellants were not entitled to relief, that nothing the appellants could have said would have been of any avail. This is a matter which appellants prefer to have an opportunity to test before an impartial court.

Appellants, by the court's ruling on the merits, as

appellees describe it, are twice hung by ex parte employer testimony ex parte employer-adduced affidavit which purport to show that they have forfeited their right to the protection of the Constitution.

#### VIOLATION OF APPELLANTS' RIGHTS UNDER NORRIS-LAGUARDIA ACT

Count One of appellants' complaint alleges that they have been deprived, by appellees, acting under color of law, of rights guaranteed by the Norris-LaGuardia Act because, by virtue of that Act, the appellee judge was wholly without jurisdiction to issue the ex parte order for contempt of which appellees are prosecuting appellants.

This issue has already been determined adversely to appellants in *ILWU v. Wirtz*, decided by this Court on September 27, 1948. Appellants have petitioned for rehearing and reargument in that case, suggesting that the broader scope of this case may give further enlightenment to the various phases of the question of the application of that Act to the Territory. The court's action on that petition will determine disposition of this count of the complaint, and no point can be served by further argument here. If the court grants that petition, however, appellants respectfully request that the court consider the petition filed in that case as if incorporated in and made a part of this reply brief at this point.

Count Two of appellants' complaint alleged that the appellee judge had no jurisdiction to grant injunctions in labor disputes because exclusive jurisdiction, in strict conformity with the Act, is con-

ferred on the federal district court of the Territory by the Norris-LaGuardia Act. This ground was urged in *ILWU v. Wirtz*, Opening Brief pp. 88-90, but not considered by the court.

There can be no question that Congress has the power to vest exclusive jurisdiction in the federal district court.

To so construe the Norris-LaGuardia Act requires no strained or twisted construction, particularly when it is read as Congress and the Supreme Court has said it must be, in conjunction with, and as an amendment to, the Sherman and Clayton Acts, both of which vest exclusive jurisdiction in the federal district court, and both of which operate on commerce in and within the Territory. To accomplish the purposes of Congress and to make effective the public policy of the United States, surely the substantive rights given by the act must be construed to be as broad as the application of the criminal sanction of these laws, out of the scope of which these substantive rights are withdrawn and legalized. Such a construction obviates any difficulties of construction in respect to appellate procedure and the right to a jury trial in indirect criminal contempt cases.

Count Three of appellants' complaint alleges that they have been deprived, by appellees, acting under color of territorial law, of substantive rights guaranteed to them by the Norris-LaGuardia Act and are being prosecuted for exercising these rights.

Appellants contend that the Norris-LaGuardia Act created federal substantive rights. Congress it-



self said it was legalizing these acts, although it felt that the acts shouldn't need legalizing, but it did so specifically because of judge-made law condemning some of the acts. These acts Congress thought it had legalized in the Clayton Act. Justice Brandeis, Homes and Clarke, dissenting in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349, thought they were legalized:

This statute (the Clayton Act) was the fruit of unceasing agitation, which extended over more than 20 years and was designed to equalize before the law the position of workingmen and employer as industrial combatants. . . .

By 1914 the ideas of the advocates of legislation had fairly crystallized upon the manner in which the inequality and uncertainty of the law should be removed. It was to be done by expressly legalizing certain acts regardless of the effects produced by them upon other persons. As to them Congress was to extract the element of injuria from the damages thereby inflicted on an employer, instead of leaving judges to determine according to their own economic and social views whether the damage inflicted on an employer in an industrial struggle was *damnum absque injuria*, because an incident of trade competition, or legal injury, because in their opinion, economically and socially objectionable. This idea was presented to the committees which reported the Clayton Act. The resulting law set out certain acts which had previously been held unlawful, whenever courts had disapproved of the ends for which they were performed; it then declared that, when these acts were committed in the course of an industrial

dispute, they should not be held to violate any law of the United States. In other words the Clayton Act substituted the opinion of Congress as to the propriety of the purpose for that of differing judges; and thereby it declared that the relations between employers of labor and workingmen were competitive relations, that organized competition was not harmful and that it justified injuries necessarily inflicted in its course. . . .

But the majority of the court disagreed. Congress, in the Norris-LaGuardia Act, legislatively overruled the majority and wrote the dissenting opinions of Justice Brandeis into law. .

The legislative history of the act shows that both the drafters of the law and the House and Senate intended to legalize as substantive rights the conduct made unenjoinable. Congress legalized these acts because they believed they should never have been held illegal, either under vague doctrines of the common law or under the Sherman Act, or the Clayton Act.

The primary objective of the Act, as stated by the Senate Committee, and as stated many times during the debates was "to protect labor in the lawful and effective exercise of its conceded rights—to protect, first, the right of free association and, second, the right to advance the lawful objections of the association."<sup>5</sup> Congress made it clear that the public policy—and the specifically defined acts are merely specifi-

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<sup>5</sup> Senate Reports 72nd Congress, First Session, Vol. 1, Report No. 163, p. 10.

cations of that policy—was positive substantive law. Thus Senator Blaine, a drafter and supporter of the bill and a member of a special sub-committee of the Senate Judiciary committee which considered the legislation and held hearings on it during the 70th, the 71st and the 72nd Congress, stated in the debates in the Senate,

When a declaration of public policy goes to the extent of declaring substantive law, then it ceases to be a mere declaration of public policy, but is the enactment of positive substantive law.<sup>6</sup>

Both the Senate and House Reports on the Bill state that the declaration of public policy was drawn in the language of the Railway Labor Act which the Supreme Court had upheld and enforced in equity in *Texas and New Orleans Railroad Co. vs. Brotherhood of Railroad and Steamship Clerks*, 281 U.S. 584. The Senate report states specifically that the Norris-LaGuardia Act creates the same rights for all employees as was given to railroad employees.

The Railway Labor Act applies to intra-territorial commerce in the Territory and is an exercise by Congress of its plenary power to legislate for the Territory. Under the *Texas and New Orleans* case all employees of railroad carriers in the Territory, as defined in that Act could enforce their substantive rights in equity in the federal court. It is appellants' contention that Congress clearly intended to give the same substantive rights to other employees in the Territory.

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<sup>6</sup> Congressional Record, Vol. 75, Part 5, page 4681.



Senator Norris, in presenting the bill to the Senate, stated:

Section 5 says that the doing of these acts shall not be held by a court to be a conspiracy. In Section 4 *we already say they are legal* and no injunction shall be issued against anyone, even though there are several of them who have agreed to unite in any one of them.

And after quoting with explanatory comments each of the "legal" provisions of Section 4:

Is there anybody who objects to any one of those recitals? Is there any one of them that is unfair? This amendment simply provides that *two or more* laboring men who agree to do any one of the acts I have enumerated shall not be held to be guilty of a conspiracy. What is wrong about that? I ask any fair-minded man on earth? In any other case except a case involving a labor dispute one would be laughed out of court if he tried to charge a conspiracy on evidence as to any of the acts enumerated in the provisions I have read. Such a charge would apply nowhere and never has been made, so far as I know, except against men who toil, and as a rule, against men who toil down in the bowels of the earth in the mines.

Senator Bratton asserted:

The difference is that *the acts enumerated in section four* are perfectly legal.

Senator Norris replied:

We have declared them to be so, although it ought not to be necessary to do so.<sup>7</sup>

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<sup>7</sup> Congressional Record, Volume 75, Part 5, p. 4931.

But the appellees adopt the argument of the Employers Council argue that these substantive rights do not affect territorial law. They concede that the Sherman Act applies to the territory, and that Congress carved these rights from the operation of the Sherman Act as judicially determined by courts and said that they should no longer be held or considered to be violations of any law of the United States, including the Sherman Act.

Of course these rights do not affect state law, except to the extent that they are coextensive with constitutional rights. Congress cannot declare what the public policy of a state is, but it can and did declare what the public policy is in the Territory. Congress did not assume to control monopolies in intra-state commerce, but it did assume to control them in intra-territorial commerce. It would be absurd to assert that what Congress specifically declared legal in an act which applies throughout the Territory can be declared illegal by the Territory. Appellees would certainly not argue that the Territory could legalize the acts made illegal by the Sherman Act, yet where is the difference?

Appellees and the Employers Council urge that since "laws of the territory" are not "laws of the United States," that "laws of the United States" are now "laws of the Territory." But the argument is a non-sequitur. Laws of the Territory have no force and effect outside the Territory. The legislative power of the Territory extends only to rightful subjects of legislation not inconsistent with laws of the

United States, locally applicable. Laws of the United States, however, are laws of the Territory if they are locally applicable to the Territory. The Organic Act of the Territory, or of Puerto Rico or laws passed by Congress for the government of the District of Columbia are obviously not "laws of the United States" in the sense that they can furnish a basis for federal jurisdiction. If such acts were so construed, the delegation of power by Congress to territorial governments would be nullified.

It is amazing to appellants that appellees should use the definition of "person" in the Clayton and Sherman Acts, both of which concededly apply in full scope to the Territory on the anti-trust side, to buttress an argument that Congress did not intend persons and associations in the Territory to have the substantive rights given by the act. "Person" is specifically defined to include corporations and associations under the laws of the Territories. As a matter of fact this very section is set forth in the U. S. Labor Code (29 U.S.C. 53) immediately following the section which creates the substantive rights, as well as in 15 U.S.C. 12 which appellees cite. This clearly indicates that the substantive rights are to be given full effect in the Territory.

Appellants contend that the substantive rights created by the Norris-LaGuardia Act, here relevant, are the rights created by section 2 to engage in concerted activity; the rights created in Section 4, singly or in concert, to give publicity to the existence of, or the facts involved in any labor dispute, whether by



advertising, speaking, patrolling, or by any other method not involving fraud or violence, and to assemble peaceably to act or to organize to act in promotion of their interests in a labor dispute; the right in section 5 to engage in this conduct singly or in concert without having it declared to be a combination or conspiracy; and the right in section 5 not to be held responsible for the unlawful acts of others.

If these substantive rights are in force in the Territory, then the ex parte order, prohibiting as it does engaging in concerted activity in numbers of more than three, is clearly beyond the power of the appellee judge. For the only power he has is to restrain acts of fraud or violence by the persons who committed them.

#### VIOLATION OF CONSTITUTIONAL RIGHTS

Count Four of appellants' complaint alleges that the appellees by their conduct are depriving appellants of rights guaranteed by the First Amendment since the ex parte order of the appellee judge restrains peaceful picketing, and appellees are being prosecuted for engaging in peaceful conduct.

The issue here is narrow and concise. The area in which we must determine whether a conflict exists with rights guaranteed by the First Amendment is clear, precise and well defined.

The defendant judge at the request of Lihue Plantation Company restrained the International Longshoremen's & Warehousemen's Union (CIO)—a trade Union consisting of thousands of members em-

ployed in the Territory, throughout the continental United States, Puerto Rico and Canada; Local 149 of said Union, which includes the employees of almost all the sugar plantations on the Island of Kauai; Unit 1 of Local 149, which includes the employees of Lihue Plantation Company; the individual officers of Unit 1 of Local 149; and unnumbered John and Mary Does and Roes, "until the further order of this court from *in any way* . . .

(7) Mass picketing by assembling in compact groups or congregating in crowds on or near real property of the petitioner, whether used for business of residence purposes, to thereby prevent or attempt to prevent or in any manner physically obstruct or *interfere* with ingress to or egress from said real property by petitioner, any of its employees, or any other persons lawfully seeking to enter or leave any of said real property;

AND IN FURTHERANCE HEREOF, you are hereby ordered to limit the number of pickets which you shall use to not more than three (3) pickets in a group at any point and station when stationed at points of ingress to and egress from the petitioner's property, provided, however, that any pickets in excess of three (3) at any one point and station, shall be in motion, and, except when passing each other, shall maintain a distance of not less than ten (10) feet between each other . . .

and all pickets being also enjoined from *otherwise committing* any of the acts hereinbefore prohibited. (R., 41, 45-46.)

The plaintiffs are charged with criminal contempt for violating these specific provisions of the restraining order. Since the Fifth and Sixth Amendments require that defendants be apprised with particularity of the offense with which they are charged the criminal prosecution in the territorial court will be limited to these charges, for conviction on a charge not made would be sheer denial of due process.

It is apparent from a mere reading of the terms of this order that no ascertainable standard of conduct is provided:

1. Thus in any way to mass picket at or near the real property of petitioner whether used for business or residence purposes is proscribed, and this is defined as

(1) Three pickets at any point and station when stationed at any point of ingress to and egress from petitioner's real property or on or near thereto;

(2) Points and stations (other than ingress and egress or near thereto presumably) if more than three to be in motion ten feet apart provided that notwithstanding these conditions pickets shall not otherwise commit any of these acts.

2. In any manner assembling in compact groups under the same circumstances as above.

3. In any manner congregating in crowds under the same circumstances as above.

4. In any manner doing any of these acts to prevent or attempt to prevent ingress to and egress from petitioner's property.



5. In any manner interfering with the ingress to or egress from said real property by any persons.

The pickets at their peril were required to determine what comprises points of ingress to and egress from petitioner's real property, whether used for business, residence purposes or at or near thereto. Geographically this covers thousands of acres, numerous company towns, miles of public and company owned roads. They were required to determine whether in any manner any act of theirs otherwise had the effect of accomplishing the prohibited acts. They were required to determine what were points and stations (presumably other than ingress to or egress from or at or near thereto).

Presumably also because of the provision "all pickets being also enjoined from otherwise committing any of the acts prohibited," the foregoing specific prohibitions assume a tentative quality.

It has long been held that the language of an injunction should be so clear and explicit that an unlearned man can understand its meaning without the necessity of employing counsel. *Laurie v. Laurie*, 9 Page 234.

Appellants—none of whom were individual defendants in the injunction suit and most of whom are not employed by Lihue Plantation Company—were charged with violating these provisions of the order only. No fraud or violence is charged.

Appellees deny that the order must be judged on its face to determine whether it is in conflict with rights guaranteed by the First Amendment. Al-

though appellees urge that the order is valid on its face, they also assert that the court can look behind the order to determine the facts.

Appellees and counsel for the employers rely on *Milk Wagon Drivers v. Meadowmoor Dairies*, 312 U.S. 287, 61 S. Ct. 552, 85 L. Ed. 836, to support the right to go behind the face of the amended ex parte order. Both evidently assume from the language of the majority that the findings of fact of the master were not set forth in the decree. It is difficult to determine from the case whether the decree included the findings. But it is obvious from the companion case, decided the same day, *American Federation of Labor v. Swing*, 312 U.S. 321, 61 S. Ct. 568, 85 L. Ed. 855, that the majority and the dissenters were not in disagreement that injunctions are to be judged on their face to determine conflict with the first amendment. At page 308 of the *Meadowmoor* case, Justice Black stated:

There is every reason why we should look at the injunction as we would a statute, and if upon its face it abridges the constitutional guaranties of freedom of expression, it should be stricken down. . . . The injunction, like a statute, stands as an overhanging threat of future punishment.

And Justice Frankfurter who wrote the opinion of the court in both the *Meadowmoor* and *Swing* cases, said in the later case, "it would be improper to dispose of the case otherwise than on the face of the injunction." In the *Swing* case there were claims of violence and libel.

The rule must be drawn from these two cases, taken together. All the *Meadowmoor* court held was "in the circumstances of the record before us the injunction authorized by the supreme court of Illinois does not transgress its constitutional power." But appellees claim the facts here come within the circumstances of the *Meadowmoor* case. A history of that case discloses that appellees contort the holding of the case.

The Supreme Court of Illinois (371 Ill. 377, 21 N.E. 308) in the *Meadowmoor* case held that the scope of the Illinois anti-injunction Act did not extend to cases where there was no employer-employee relationship and that it had power to restrain picketing where this relationship did not exist. It further held that the right of owners of property to be free from interference by unlawful secondary boycotts could be protected even to the extent of forbidding peaceful picketing and the carrying of signs. While the court in passing mentioned the violence found by the master, its decision was clearly based on the unlawfulness of the secondary boycott in Illinois because it interfered with property rights. The Supreme Court sustained the decision of the Illinois Court on the ground that even peaceful picketing could be restrained when there was a flagrant background of violence or when the picketing had been permeated with violence and held that Illinois could choose to exercise its police power through its courts if it saw fit. On the basis of the Supreme Court's decision in the *Swing* and *Meadowmoor* cases, in



*Lawrence Ave. Bldg. Corp.*, 377 Ill. 37, the Illinois Supreme Court reversed itself in the *Meadowmoor* case, saying that the Supreme Court had held that peaceful picketing was protected by the right of free speech in a secondary boycott. In that case even though there was no employer-employee relationship the court refused an injunction and said it found "no threats of violence to indicate a secondary boycott."

Appellants believe that the *Meadowmoor* case is completely distinguishable on the facts from this case, and that it was carefully distinguished from the question that now confronts this court. That case did not involve an ex parte hearing issued without notice. The lower court after lengthy hearings by a master denied an injunction against any conduct except acts of violence. The time schedule in that case was as follows: The acts of violence alleged extended over a period of three years; picketing began eight months after the alleged acts of violence; it was four years afterwards before the trial judge granted an injunction, limited to violence alone; five years before the Supreme Court of Illinois directed a more stringent injunction against peaceful persuasion, and seven years before the United States Supreme Court sustained the injunction. The injunction was based on a finding of the master that because of the past acts of violence, even peaceful picketing would evoke fear in strangers to the dispute. It is obvious from the majority opinion that but for the long and extended hearings, the findings

of fact, that the same result would not have been reached. Thus the court says:

Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made . . .

It is to be recalled that in the *Meadowmoor* case the Supreme Court said that Illinois could choose to exercise its police power through its courts consistent with the Fourteenth Amendment. Congress itself has empowered territorial courts to exercise only the judicial power and has delegated to the legislative the power to legislate on all rightful subjects not inconsistent with the federal constitution and laws. It must be remembered also, that, the Fourteenth Amendment does not transmit to residents of states all the rights guaranteed by the Bill of Rights. The Territory is limited directly by the First Amendment. In the police power under the 14th the test is the reasonableness of its exercise and not the clear and present danger test under the First.

For the reasons stated above we do not think the *Meadowmoor* case affords any support to the position of the appellees.

But it is clear that defendants' whole case rests primarily on the *Meadowmoor* case and that the lower court relied heavily upon that decision. So let us assume for the purposes of argument the

application of the principles laid down in that case to the facts here.

The Supreme Court warned in the *Meadowmoor* case that:

Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights be defeated by insubstantial finds of fact screening reality.

That legal scholars, Congress and the courts consider affidavit proof and partisan testimony where the right of cross examination is lacking insubstantial and unreliable in labor injunctions cannot at this point be refuted. Thus Justice Frankfurter who wrote the court's opinion in the *Meadowmoor* case in his book, *The Labor Injunction* says:

In labor cases, however, complicating facts enter. The injunction cannot preserve the so-called status quo; the situation does not remain in equilibrium awaiting judgment upon full knowledge. The suspension of activities affects only the strikers; the employer resumes his efforts to defeat the strike, and resumes them free from the interdicted interferences. Moreover, the suspension of strike activities, even temporarily, may defeat the strike for practical purposes and foredoom its resumption, even if the injunction is later lifted. Choice is not between irreparable damage to one side and compensable damage to the other. The law's conundrum is which side should bear the risk of unavoidable irreparable damage. Improvident denial of the injunction may be irreparable to the complainant; improvident issue of the injunction may be irreparable to the de-



fendant. For this situation the ordinary mechanics of the provisional injunction proceedings are plainly inadequate. Judicial error is too costly to either side of a labor dispute to permit perfunctory determination of the crucial issues; even in the first instance, it must be searching. The necessity of finding the facts quickly from sources vague, embittered and partisan, colored at the start by the passionate intensities of a labor controversy, calls at best for rare judicial qualities. It becomes an impossible assignment when judges rely solely upon the complaint and the affidavits of interested or professional witnesses, untested by the safeguards of common law trials—personal appearance of witnesses, confrontation and cross-examination.

And again Justice Frankfurter, after pointing out the fact that most judges in the heyday of the hated labor injunction followed the general rule that picketing per se is an admission of violence, said further:

Other courts, contrariwise, have held fast to general agency principles and have exacted the full quantum of proof normally required to establish the responsibility of one person for the acts of another. They have insisted that the affidavits prove the union to be chargeable with the acts complained of, as a condition precedent to the inclusion of the union within the restraint of the injunction. As one New York judge rhetorically asks: "Is it the law that a presumption of guilt attaches to a labor union association?"

To expect such a mode of hearing to elicit the truth about these ambiguous acts and motives of men is to look for miracles. To ask such a

system of procedure to work without serious friction and without arousing wide scepticism regarding law's fair-dealing is to subject the legal order to undue stress and strain. The chancellors of the fourteenth and fifteenth centuries pursued more rational methods of eliciting truth . . .

This ancient wisdom has been forgotten in the most sensitive contact between law and feeling. To quote Judge Amidon again "... affidavits are an untrustworthy guide for judicial action . . . it is peculiarly true of litigation growing out of a strike, where feelings on both sides are necessarily wrought up, and the desire for victory is likely to obscure nice moral questions and poison the minds of men by prejudice . . . Experience . . . has caused me to be so incredulous of affidavits that I have required in all important matters the presence of the chief witnesses upon each side at the hearing. These witnesses have been subjected to oral examination. The court has had a chance to observe their demeanor. A comparison of the picture produced by their testimony with that produced by their affidavits has proven the utter untrustworthiness of affidavits. Such documents are packed with falsehoods, or with half-truths, which in such a matter are more deceptive than deliberate falsehoods."

Appellants submit there can be nothing but insubstantial findings of fact screening reality in ex parte hearings, and that when a judge assumes to go beyond restraining acts of violence alleged by an employer to have occurred and restrains even peace-

ful activity, he has exceeded his power and made a mockery of the Bill of Rights.

But the court in the *Meadowmoor* case did not stop with the warning against insubstantial proofs. The court pointed out that the master found, and the Illinois Supreme Court rested its decision on a finding that because of the past violence of bombings and window smashing, third persons would be intimidated because . . .

The momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. So the Supreme Court of Illinois found. We cannot say that such a finding so contradicts our own experience to warrant our rejection.

The Court here referred to violence which included window smashing, bombing and burning of stores and physical violence extending over a period of four years.

Appellees urge this court that acts committed a day or so before an ex parte hearing justify a restraint against peaceful activity on the part of all sugar workers on the Island of Kauai and all other workers belonging to the same union, the International Union and all activity on, at or near the thousands of acres of the employers' property or the 20 company towns in which the employers live.

The New York courts have interpreted the New York anti-injunction act and this case to mean there must be a finding of the court that peaceful picketing in the future will be impossible before peaceful picketing or assembly can be restrained.



The appellees and the lower court also relied upon *Allen Bradley v. Local Board*, 315 U. S. 750, as condemning mass picketing. That case involved a statutory injunction entered by a Wisconsin court at the request of the State Labor Relations Board which had conducted lengthy hearings. In the words of the United States Supreme Court: "The sole question presented by this case is whether an order of the Wisconsin Employment Peace Act is repugnant to the provisions of the National Labor Relations Board." No constitutional questions were presented or argued and the Clayton and Norris-LaGuardia Acts were not involved.

The Supreme Court, in *Winters v. New York*, 92 L. ed. Advance Sheets 654, at page 660, restates the test that must be made of enactments which touch on the rights guaranteed by the First Amendment:

When a legislative body concludes that the mores of the community call for an extension of the impermissible limits, an enactment aimed at the evil is plainly within its power, if it does not transgress the boundaries fixed by the Constitution for freedom of expression. The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime "must be defined with appropriate definiteness." *Cantwell v. Connecticut*, 310 US 296, 84 L ed 1213, 60 S Ct 900, 128 ALR 1352; *Pierce v. United States*, 314 US 306, 311, 86 L ed 226, 230, 62 S Ct 237. There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the

meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act, *Lanzetta v. New Jersey*, 306 US 451, 83 L ed 888, 59 S Ct 618, or in regard to the applicable tests to ascertain guilt.

The court cites with approval the language of the New Mexico Supreme Court in *State v. Diamond*, in 27 NM 477, 202 P 988, that where the statute uses words of no determinative meaning, or the language is so general and indefinite as to embrace not only acts commonly recognized as reprehensible, but also others which it is unreasonable to presume were intended to be made criminal, it will be declared void for uncertainty.

It is apparent that the *ex parte* amended restraining order is an order designed to break a strike. We are not concerned here with narrow city streets and crowded industrial area, but with an agricultural strike involving large areas and large numbers of employees. Let us assume, for example, that an employer having procured an order limiting picketing to three persons, sets into operation what the LaFollette Civil Liberties Committee described as a Mohawk Valley Plan whereby every means of communication and public pressure is used against employees to defeat their morale, and to assure them that the strike is broken. Under such circumstances, picketing is the only means which the employee has to communicate his faith in collective action.

It is true that there is a coercive effect to large numbers of pickets, particularly in company towns,

but the coercive quality is a quality of moral coercion, a fear of being ostracized by one's friends and neighbors. It is obvious that if a circuit court of the Territory has the power on mere *ex parte* representation by an employer to so narrowly limit the right to picket, then an invincible sword has been forged by the court to strike to the heart every labor organization in the Territory.

Even under the Fourteenth Amendment, where states, it is said, may exercise their police power through the judicial arm, the test of reasonableness must apply.

Even assuming for the argument under this count of appellants' complaint that a circuit court may limit the numbers of pickets, surely that limitation must be reasonable in the light of the facts and circumstances, and surely the order must be couched in language so that men of common understanding can understand and interpret its meaning.

Appellants respectfully submit that the amended temporary restraining order and the information under it which charges no act of fraud or violence violates appellants' rights of free speech, and is void because it is vague and ambiguous and includes within its scope lawful as well as unlawful conduct.

#### POWER OF TERRITORY TO PUNISH FOR CONTEMPT OF A VOID ORDER

The Attorney General urges that the Territory has the power to punish as criminal contempt violations of an order issued without jurisdiction or ex-



ceeding the jurisdiction of the appellee judge, or even if the order is in violation of the rights guaranteed by the First Amendment. In the *Meadowmoor* case, so heavily relied upon by appellees, the majority of the court said that even if an appropriate injunction were put to abnormal uses so that encroachments were made on free discussion outside of the limits of violence, the doors of the Supreme Court are always open.

The *Lewis* case, on which appellees relied, is not decided on the basis of Constitutional rights, nor is the holding of the court a reliable one as a guide for such a serious contention. It will be recalled that four justices found that the Norris-LaGuardia Act did not restrict the jurisdiction of federal courts when an injunction was applied for by the Government of the United States. Justice Frankfurter, who disagreed with this holding, concurred in the upholding of the contempt charge since he felt that the order of the federal court should have been obeyed pending appeal. A majority of the court did not need to sustain the court's jurisdiction on the ground that a federal court had a right to punish regardless of the validity of the order under federal rights. The question of contempt of an order which violates the First Amendment was not considered by the court. If this is indeed to be taken as the authoritative holding of the Supreme Court, then the Civil Rights Act has been stricken from the books.

We have arrived back at the point which Senator

Norris described in the Senate Judiciary Committee on the Norris-LaGuardia Act:

There can be no question, therefore, that there has been created, as a result of writing law into injunction orders and then enforcing those orders by the same judge who wrote them without a grant of trial by jury, that condition of uniting the two powers of making and enforcing laws in one person or one body of men wherein, using the language of Blackstone, "there can be no public liberty."

It is difficult to see how any civilized people could indefinitely submit to such tyrannical procedure. It is not difficult to understand how such cruel laws, made not by any legislature but by a judge upon the bench, should bring our Federal courts into disrepute. Neither is it difficult to see how such injunctions, violating the conscience of civilization, should frighten persons against whom such injunctions are issued into desperation. What free American citizen is willing to submit to the violation of his sacred rights of human liberty and freedom?

Respectfully submitted,

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By

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No.11873

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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HAZEL EDNA LEWIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Western District of Washington,  
Southern Division

FILED

APR 24 1948

PAUL P. O'BRIEN,  
CLERK



No. 11873

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court, Western District of  
Washington, Southern Division

No. 15870

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HAZEL EDNA LEWIS,

Defendant.

### INDICTMENT

The Grand Jury Charges:

#### Count I.

On or about December 5, 1946, at Longview, Washington, Hazel Edna Lewis procured to be falsely and fraudulently executed by Dr. J. A. Nelson a certain document required by the provisions of the Internal Revenue Laws and Regulations made in pursuance thereof, to wit, a physician's prescription for narcotics. That said prescription was falsely executed in that it contained a false and fictitious address of the patient named therein.

All in violation of 26 USC 3793.

#### Count II.

On or about December 26, 1946, at Longview, Washington, Hazel Edna Lewis procured to be falsely and fraudulently executed by Dr. J. A. Nelson a certain document required by the provisions of the Internal Revenue Laws and Regulations made in pursuance thereof, to wit, a physician's prescription for narcotics. That said prescription was falsely

executed in that it contained a false and fictitious address of the patient named therein.

All in violation of 26 USC 3793.

### Count III.

On or about March 15, 1947, at Kelso, Washington, Hazel Edna Lewis procured to be falsely and fraudulently executed by Dr. C. W. Spellman a certain document required by the provisions of the Internal Revenue Laws and Regulations made in pursuance thereof, to wit, a physician's prescription for narcotics. That said prescription was falsely executed in that it contained a false and fictitious address of the patient named therein.

All in violation of 26 USC 3793.

### Count IV.

On or about March 15, 1947, at Kelso, Washington, Hazel Edna Lewis procured to be falsely and fraudulently executed by Dr. J. F. Christensen a certain document required by the provisions of the Internal Revenue Laws and Regulations made in pursuance thereof, to wit, a physician's prescription for narcotics. That said prescription was falsely executed in that it contained a false and fictitious address of the patient named therein.

All in violation of 26 USC 3793.

### Count V.

On or about March 25, 1947, at Chehalis, Washington, Hazel Edna Lewis procured to be falsely and fraudulently executed by Dr. Leonard G. Mor-



ley a certain document required by the provisions of the Internal Revenue Laws and Regulations made in pursuance thereof, to wit, a physician's prescription for narcotics. That said prescription was falsely executed in that it contained a false and fictitious address of the patient named therein.

All in violation of 26 USC 3793.

#### Count VI.

On or about March 25, 1947, at Winlock, Washington, Hazel Edna Lewis procured to be falsely and fraudulently executed by Dr. Robert H. Fishbach a certain document required by the provisions of the Internal Revenue Laws and Regulations made in pursuance thereof, to wit, a physician's prescription for narcotics. That said prescription was falsely executed in that it contained a false and fictitious address of the patient named therein.

All in violation of 26 USC 3793.

#### Count VII.

On or about June 5, 1947, at Winlock, Washington, Hazel Edna Lewis procured to be falsely and fraudulently executed by Dr. Robert H. Fishbach a certain document required by the provisions of the Internal Revenue Laws and Regulations made in pursuance thereof, to wit, a physician's prescription for narcotics. That said prescription was falsely executed in that it contained a false and fictitious address of the patient named therein.

All in violation of 26 USC 3793.

Count VIII.

On or about June 5, 1947, at Chehalis, Washington, Hazel Edna Lewis procured to be falsely and fraudulently executed by Dr. Leonard G. Morley a certain document required by the provisions of the Internal Revenue Laws and Regulations made in pursuance thereof, to wit, a physician's prescription for narcotics. That said prescription was falsely executed in that it contained a false and fictitious address of the patient named therein.

All in violation of 26 USC 3793.

Count IX.

On or about September 2, 1947, at Toledo, Washington, Hazel Edna Lewis procured to be falsely and fraudulently executed by Dr. R. C. Maher a certain document required by the provisions of the Internal Revenue Laws and Regulations made in pursuance thereof, to wit a physician's prescription for narcotics. That said prescription was falsely executed in that it contained a false and fictitious address of the patient named therein.

All in violation of 26 USC 3793.

A True Bill.

/s/ HANS M. ANDERSON,  
Foreman.

/s/ J. CHARLES DENNIS,  
United States Attorney.

/s/ HARRY SAGER,  
Assistant United States  
Attorney.

[Endorsed]: Filed Oct. 21, 1947.

District Court of the United States, Western  
District of Washington, Southern Division

No. 15870

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HAZEL EDNA LEWIS,

Defendant.

### VERDICT

We, the jury empanelled in the above-entitled cause, find the defendant, Hazel Edna Lewis,

Is Guilty as charged in Count I of the Indictment herein;

Not Guilty as charged in Count II of the Indictment herein;

Not Guilty as charged in Count III of the Indictment herein;

Is Guilty as charged in Count V of the Indictment herein;

Not Guilty as charged in Count VI of the Indictment herein;

Not Guilty as charged in Count VII of the Indictment herein;

Is Guilty as charged in Count VIII of the Indictment herein;

Dated this 5th day of January, 1948.

/s/ W. R. ALLEN,

Foreman.

[Endorsed]: Filed Jan. 5, 1948.



United States District Court, Western District  
of Washington, Southern Division

No. 15870

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HAZEL EDNA LEWIS,

Defendant.

### JUDGMENT AND SENTENCE

On this 12th day of January, 1948, came the attorney for the government, and the defendant appeared in person and by William N. Goodwin, her attorney, and the probation officer for this district having made a presentence investigation, and reported to the court,

It Is Adjudged that the defendant has been convicted upon her plea of not guilty, a jury having been regularly impaneled and a trial held on the merits and a verdict of guilty rendered by the jury of a violation of 26 USC 3793 (procuring execution of false narcotic prescriptions), as charged in Counts I, V and VIII of the Indictment, and the court having asked the defendant whether she has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years on each of Counts I, V and

VIII of the Indictment, said sentences to run concurrently with each other and not consecutively. The court recommends commitment to an institution for the treatment of narcotic addicts.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that a copy serve as the commitment of the defendant.

Done in Open Court this 12th day of January, 1948.

/s/ CHARLES H. LEAVY,  
United States District Judge.

Presented by:

/s/ HARRY SAGER,  
Assistant United States  
Attorney.

[Endorsed]: Filed Jan. 12, 1948.

---

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Name and address of appellant: Hazel Edna Lewis, 4015 S. E Franklin, Portland, Oregon.

Name and address of appellant's attorney: Earl V. Clifford, 905 Rust Building, Tacoma 2, Washington.

Offense: Procuring execution of false narcotics prescriptions. Concise statement of judgment or order, giving date and any sentence:

Judgment and sentence that defendant has been convicted upon her plea of not guilty on jury trial

of a violation of 26 USC 3793, and is guilty as charged on three counts of Indictment returned against her, and that she be committed to the custody of the Attorney General or his authorized representatives for a period of two (2) years on each of Counts 1, 5 and 8 of the Indictment, said sentences to run concurrently with each other and not consecutively, and that her commitment to an institution for treatment of narcotics addicts be recommended; said judgment and sentence entered and filed January 12, 1948.

Name of institution where now confined, if not on bail: City Jail, Tacoma, Washington.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the above stated judgment and sentence.

Dated this 17th day of January, 1948.

/s/ HAZEL EDNA LEWIS,

EARL V. CLIFFORD,

Attorney for Appellant.

Copy of the foregoing Notice of Appeal delivered to the U. S. Attorney, Tacoma, Washington, and copy of said Notice of Appeal, together with a Statement of the Docket Entries in the above entitled cause transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 19th day of January, 1948.

/s/ E. E. REDMAYNE,

Deputy Clerk.

[Endorsed]: Filed Jan. 19, 1948.



[Title of District Court and Cause.]

ORDER

On application of Earl V. Clifford, attorney for the defendant, made in presence of Guy A. B. Dovell, one of the attorneys for the plaintiff, for entry of the within Order; and the Court in its discretion favoring the granting of such application.

It Is Ordered that the time for filing the record on appeal and docketing the appeal be and it hereby is extended for fifteen days beyond the time at which it would otherwise expire under the rules.

Done In Open Court this 18th day of February, 1948.

/s/ LLOYD L. BLACK,  
Judge.

Presented by:

/s/ EARL V. CLIFFORD,  
Attorney for Defendant.

[Endorsed]: Filed Feb. 18, 1948.

[Title of District Court and Cause.]

STATEMENT OF POINTS

Comes now the defendant and makes a concise statement of the points on which she intends to rely on appeal, as follows:

That no count of the Indictment under which the defendant was convicted charges an offense punishable by law.

/s/ EARL V. CLIFFORD

Attorney for Defendant.

Received copy this 19th day of February, 1948.

/s/ GUY A. B. DOVELL,

Ass't U. S. Attorney.

[Endorsed]: Filed Feb. 19, 1948.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO CONTENTS  
OF RECORD ON APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing transcript, consisting of pages numbered 1 to 19, inclusive, is a full, true and correct record of so much of the papers and proceedings in Cause No. 15870, United States of America, Plaintiff, vs. Hazel Edna Lewis, Defendant, as required by Defendant-Appellant's Designation of the Contents of the Record on Appeal, on file and of record in my office at

Tacoma, Washington, and the same constitutes the Transcript of the Record on Appeal from the Judgment of the District Court of the United States for the Western District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a full, true and correct statement of all expenses, fees and charges earned by me in the preparation and certification of the aforesaid Transcript of Record on Appeal, to wit:

Appeal fee.....\$5.00

Clerk's fee for preparation of

Record on Appeal..... 2.00

---

\$7.00

and I further certify that the said fees, above set out, have been paid in full.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington, this 9th day of March, 1948.

[Seal]

MILLARD P. THOMAS,

Clerk,

By /s/ E. E. REDMAYNE,

Deputy.



[Endorsed]: No. 11873. United States Circuit Court of Appeals for the Ninth Circuit. Hazel Edna Lewis, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed March 12, 1948.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11873

HAZEL EDNA LEWIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS AND DESIGNA-  
TION OF PARTS OF RECORD

Comes now the appellant and concisely states the point or points on which she intends to rely on appeal, as follows:

That no count of the Indictment under which the defendant was convicted charges an offense punishable by law.

And further comes now the appellant and designates the parts of the record which she thinks necessary for the consideration of the above stated point, as follows:

Indictment

Judgment and Sentence

Verdict

/s/ EARL V. CLIFFORD,  
Attorney for Appellant.

Service of the above is hereby admitted this 20th day of March, 1948.

/s/ J. CHARLES DENNIS,  
Attorney or Attorneys for  
Appellee.

[Endorsed]: Filed March 22, 1948.

No. 11873

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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HAZEL EDNA LEWIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

Brief of Appellant

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UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT  
OF WASHINGTON, SOUTHERN DIVISION

---

EARL V. CLIFFORD

905 Rust Building

Tacoma, Washington,

*Attorney for Appellant.*

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FILED

MAY 12 1948

PAUL P. O'BRIEN,

CLERK





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No. 11873

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

---

HAZEL EDNA LEWIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

Brief of Appellant

---

UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT  
OF WASHINGTON, SOUTHERN DIVISION

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STATEMENT OF PLEADINGS AND FACTS

Appellant was found guilty under counts I, V and VIII of the indictment. The language of each count is indetical except for the date and place of the charge and the name of the doctor who executed the alleged document. The language of Count I is as follows:

“On or about December 5, 1946, at Longview, Washington, HAZEL EDNA LEWIS procured to be falsely and fraudulently executed by Dr. J. A. Nelson a certain document required by the provisions of the Internal Revenue Laws and

Regulations made in pursuance thereof, to-wit, a physician's prescription for narcotics. That said prescription was falsely executed in that it contained a false and fictitious address of the patient named therein.

All in violation of 26 USC 3793."

Attempting to trace the law upon which the counts are based appellant turns first to the Internal Revenue Code and notes that USCA, Title 26, section 2550, imposes a tax per ounce on certain narcotics to be paid by the importer, manufacturer, producer or compounder.

Section 3793, entitled Penalties and Forfeitures, applies generally to all the tax levying provisions of the Internal Revenue Code, including income, estate and gift taxes and about twenty-five other kinds of tax on activities and commodities. Therefore section 3793 is in aid of the ascertainment, and collection of many taxes including a tax on narcotics. It hasn't anything to do with the prevention of use of narcotics or punishment for addiction to the use of narcotics.

The provisions of section 3793, insofar as applicable to the charges in said counts, are as follows:

"Every person who simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the Internal Revenue laws, or by any regulation made in pursuance thereof; or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; shall be imprisoned for a term not less than one year nor more than five years.

The term 'person' as used in this subsection includes an officer or employee of a corporation or a member or employee of a partnership who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs."

Next appellant notes that in reference to above section 2550, there is a section 2559 in part, as follows:

"The Secretary shall make, prescribe, and publish all needful rules and regulations for carrying the provisions of this subchapter . . . into effect."

And appellant notes that section 2606 authorizes the Secretary to confer or impose upon the Commissioner of Narcotics his powers, etc., under the above section 2559.

And appellant notes that United States Treasury Department, Bureau of Narcotics, Regulations No. 5, effective June 1, 1938, provides in part, as follows:

"ART. 168. Manner of execution—Practitioners. All prescriptions for drugs and preparations shall be dated as of and signed on the day when issued and shall bear the full name and address of the patient . . ."

Appellant is not sure that she has surmised the provisions or all the provisions upon which appellee relies, and must await appellee's response. The writer of this brief took no part in the trial and was unfamiliar with this case until thereafter.

#### STATEMENT OF POINTS

That no count of the Indictment under which the



defendant was convicted charges an offense punishable by law.

## ARGUMENT

### First

The above statutory provision regarding who is included under the term "person," specifies a class of agents or servants of those executing or signing any bond, permit, entry or other document. The plain inference is that only principals or their agents or servants are subject to the penalties of the section. The appellant was neither an executing nor signing principal or an agent or servant.

### Second

From the above it will be noted that the law as enacted by Congress contains no requirement that a prescription bear the address of the person to whom issued. The requirement in that regard is an entirely new element added by regulations issued under authority of the Secretary, under which the appellant is convicted as a felon. Appellant submits that she cannot be convicted under a regulation, making something criminal which is not criminal under the act. *U. S. vs. Caton*, 12 S. Ct. 764, 144 U. S. 677, 36 L. Ed. 591.

### Third

26 U.S.C., Sec. 2554 provides in part, as follows:

"It shall be unlawful for any person to sell, barter, exchange or give away any of the drugs mentioned in section 2553 (a) except in pursuance of a written order of the person to whom such

article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

“Nothing contained in this section . . . shall apply—

“1. (Use of drugs in professional practice.)

“2. Prescriptions. To the sale, disbursing, or distribution of any of the drugs mentioned in section 2550 (a) by a dealer to a consumer under and in pursuance of a written prescription issued by a physician . . . Provided, however, that such prescription shall be dated as of the day on which signed and shall be signed by the physician . . .”

The above provision regarding “Prescriptions” contains no requirement that it carry any address of the person to whom issued.

In the text of the act which follows above notation “1. (Use of Drugs in professional practice)” there is a requirement that the physician keep a record of the address of the patient. This makes the omission of such requirement from the provisions regarding “Prescriptions” doubly significant.

#### Fourth

In *United States vs. Peppa*, 13 Federal Supplement 669, it is held that one who raised the amount on an order form for narcotics did not simulate same under penal provisions of Section 3793; and that simulation has to be of the entire order form. In the case at bar the appellant is charged with procuring execution of a document false and fraudulent in one particular, namely her address. The prescription was otherwise

valid and proper. If Peppa was not guilty, appellant should not be held guilty.

That case also holds at Pg. 671, as follows:

“Penal statutes are to be construed narrowly. In applying this principle we are required to adopt that sense of the words which best harmonizes with the context and the end to be achieved by the legislation.” (Citing cases.)

“A study of the section under which the indictment was drawn indicates that it was the object to punish the simulation, execution, or signing of certain instruments. Evidently it did not intend that the mere alteration of any such instrument should constitute an offense.”

Accordingly under the act, not added to by regulations, the appellant would not be guilty, as she did not procure the execution of a document entirely false and fraudulent. In fact the prescription was a valid one.

If appellant had changed a right address on the prescription to a wrong address she would not be guilty. It seems to be straining the law to say she is guilty for giving the wrong address in the first place.

#### Fifth

In the counts the appellee charges that appellant procured to be falsely and fraudulently executed a document, to-wit: a physician's prescription.

A prescription is a written medical recipe. *Mayer vs. State*, 42 A. 63, N. J. L. 35.

A prescription is the mere formula for the prepara-



tion of a drugs and medicine. *People vs. Cohen*, 157 N.Y.S. 591.

Prescription as defined by Webster is a direction of a remedy or of remedies for a disease, and the manner of using them. A medical recipe; also a prescribed remedy. *State vs. Bluefield Drug Co.* 27 S. E. 350, 43 W. Va. 144.

### CONCLUSIONS

No addiction to the use of drugs is involved here. Anyone of us obtaining a first prescription from a physician could be convicted of a felony for giving a wrong address if this prosecution is right.

No obtaining of narcotics from an illegal source is involved here.

The law is supposed to be sufficiently clear and certain to enable a citizen to tell when he is violating it. And ordinarily a department head cannot make something criminal which the legislative body has not made a crime. And the law should not be used as a means of entrapment and strained to cover a technical violation foreign to its purpose.

Appellant respectfully submits that the judgment and sentence herein should be set aside, with prejudice, and the case ordered dismissed.

EARL V. CLIFFORD

*Attorney for Appellant.*



No. 11873

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IN THE  
**United States**  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

HAZEL EDNA LEWIS,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE WESTERN DISTRICT OF WASHINGTON  
SOUTHERN DIVISION

---

HONORABLE CHARLES H. LEAVY, *Judge*

---

**BRIEF OF APPELLEE**

---

FILED

JUN 7 - 1948

**PAUL P. O'BRIEN,**  
J. CHARLES DENNIS,  
*United States Attorney*

CLERK

HARRY SAGER,  
*Assistant United States Attorney*  
*Attorneys for Appellee*

OFFICE AND POST OFFICE ADDRESS:  
324 FEDERAL BUILDING  
TACOMA 2, WASHINGTON





No. 11873

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IN THE  
**United States**  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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HAZEL EDNA LEWIS,

*Appellant,*

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE WESTERN DISTRICT OF WASHINGTON  
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HONORABLE CHARLES H. LEAVY, *Judge*

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**BRIEF OF APPELLEE**

---

J. CHARLES DENNIS,  
*United States Attorney*

HARRY SAGER,  
*Assistant United States Attorney*  
*Attorneys for Appellee*

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IN THE  
**United States**  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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HAZEL EDNA LEWIS,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE WESTERN DISTRICT OF WASHINGTON  
SOUTHERN DIVISION

---

HONORABLE CHARLES H. LEAVY, *Judge*

---

**BRIEF OF APPELLEE**

---

**JURISDICTION**

In the present cause, appellant was regularly indicted, represented by counsel, tried and convicted on Counts I, V, and VIII. Sentence of two years was imposed on each count, sentences to be concurrent.

Jurisdiction is based on Title 26 U.S.C., Section 3793.



## STATEMENT OF THE CASE

The indictment in the present cause reads as follows:

## COUNT I.

"On or about December 5, 1946, at Longview, Washington, Hazel Edna Lewis procured to be falsely and fraudulently executed by Dr. J. A. Nelson a certain document required by the provisions of the Internal Revenue Laws and Regulations made in pursuance thereof, to-wit, a physician's prescription for narcotics. That said prescription was falsely executed in that it contained a false and fictitious address of the patient named therein.

All in violation of 26 U.S.C., Section 3793."

Count V is identical except as to the date, place and name of the physician.

Count VIII is identical except as to the date, place and name of the physician.

The jury returned a verdict of guilty as to these three counts. No motion for judgment of acquittal was made by appellant.

The sole question at issue before this Court is the determination of whether the aforesaid counts of the indictment charge the commission of a crime.

Title 26 U.S.C., Sec. 3793 reads as follows:

Every person who —

A. Simulates or falsely or fraudulently executes

or signs any bond, permit, entry or other document required by the provisions of the Internal Revenue laws, or by any regulation made in pursuance thereof, or

B. Procures the same to be falsely or fraudulently executed, or

C. Advises, aids in, or connives at such execution thereof — shall be imprisoned for a term of not less than one year nor more than five years.

It will be observed that the indictment is brought under subdivision "B" of the statute. It follows the words of the Statute, and is a plain, concise and definite written statement of the essential facts constituting the offense charged. It states every material fact necessary to inform the defendant with reasonable certainty of the nature and cause of accusation against her, and to enable her by plea of former jeopardy to be protected against another prosecution for the same offense. That is sufficient.

Rules of Criminal Procedure — 7(c);

*Wilson v. United States*, 158 Fed. (2d) 659;

*United States v. Starks*, 6 F.R.D. 43;

*United States v. Grunenwald*, 66 Fed. Supp. 223.

There was no request for a bill of particulars, no motion to quash, or demurrer. There was no motion for a judgment of acquittal.

If an indictment contains averments which clearly express what was meant to be charged even though

such averments were not technically in language of the Statute, such technical defects are cured by the conviction and judgment, in view of defendant's failure to ask for a bill of particulars or to attack the indictment by motion to quash or demurrer.

*Pifer v. United States*, 158 Fed. (2d) 867;  
*Lucas v. United States*, 158 Fed. (2d) 865.

The Commissioner of Narcotics, with the approval of the Secretary of the Treasury was authorized by the Statute to issue and promulgate regulations.

Title 26 U.S.C., 2559;  
 Title 26 U.S.C., 2606.

In accordance with the authority granted by the foregoing sections of the Code, the Commissioner of Narcotics and the Commissioner of Internal Revenue, with approval by the Secretary of the Treasury, prepared, issued and promulgated the following Regulation:

“All prescriptions for drugs and preparations not specifically exempt under Section 6 of the Act shall be dated as of, and signed on the day when issued and shall bear the full name and address of the patient and the name, address and registry number of the practitioner.”

Regulations No. 5, Article 168, adopted June 1, 1938, (26 C.F.R. 151, 168).



If these Regulations were in furtherance of the purposes of the Act, they have the effect of law.

*Loose-Wiles Biscuit Co. v. Rasquin*, 20 Fed. Supp. 805;

*Yakus v. United States*, 321 U.S. 414.

That the Regulations were in furtherance of the administration of the law cannot be questioned.

The Act — 2554(c) (1), provides that in the dispensing of drugs by a physician, the physician shall keep a record of all such drugs dispensed or distributed showing the amount dispensed or distributed, the date and address of the patient to whom such drugs are dispensed \* \* \* and such record shall be kept for a period of two years.

The Act — 2554(c) (2) provides for prescriptions: To the sale, dispensing or distribution of any of the drugs mentioned in 2550(a) by a dealer to a consumer in pursuance of a written prescription; provided however that such prescription shall be dated as of the day on which signed and shall be signed by the physician who shall have issued the same, and provided further that such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, etc.

The Act—2554 provides that the possession of

drugs shall be lawful when they "have been obtained from a registered dealer in pursuance of a prescription, written for legitimate medical uses, issued by a physician \* \* \* or other practitioner registered under Sec. 3221; and where the bottle or other container in which such drug may be put up by the dealer upon said prescription bears the name and registry number of the druggist, serial number of the prescription, name and *address* of the patient, and name, address and registry number of the person writing the prescription.

## AUTHORITIES

The Federal Narcotic Acts have been the source of litigation in all phases ever since the enactment of the Harrison Narcotic Act. The constitutionality was upheld by the Supreme Court at an early date after its passage.

*United States v. Doremus*, 249 U.S. 86;

*United States v. Wong Sing*, 260 U.S. 18.

The presumptions under the Act were upheld.

*Casey v. United States*, 276 U.S. 413;

*Nigro v. United States*, 276 U.S. 332.

The Narcotic Drugs Import and Export Act was likewise upheld.

*Brolan v. United States*, 236 U.S. 216.

That a prescription is a document under the Act has been decided by this Circuit in two recent decisions.

In the case of *Johnson v. Warden, U. S. Penitentiary*, 134 Fed. (2d) 166, this Court held—

A forged physician's prescription for narcotics would fall within the meaning of the phrase "other writing" as used in the Statute making uttering of a forged bond, bid, etc., or other writing for the purpose of defrauding the United States.

"By 26 U.S.C.A. Internal Revenue Code, Sec. 2554, it is made unlawful for any person to sell or give away any narcotic drugs except in named circumstances, one of which is upon prescription issued by a registered physician, dentist or veterinary surgeon. It is obvious that the utterance of a forged prescription tends directly to frustrate the laws of the United States relating to the dispensing of narcotics."

And in *Hart v. Squier*, 159 Fed. (2d) 639, in which case the indictment charged the defendant with uttering and publishing as true a certain false writing, being a prescription for narcotic drugs issued by Wm. C. Riddell, M.D., a registered physician, and purportedly issued to Melvin G. Baker, 902 - 6th Ave., Seattle, Washington, which was the false and fictitious name and address of the said defendant, this Court ruled—



"In *Johnson v. Warden*, we held that a prescription for obtaining narcotic drugs was a 'writing' within the terms of the Statute. We further held that it was unnecessary to show any pecuniary loss to the Government as a result of the fraud, and that it was enough that the unlawful activity frustrated the administration of a statute (in this case 26 U.S.C.A. 2554). The narrow inquiry, therefore, is: Is the prescription 'false' or 'forged' within the meaning of the statute?

"To state the question is to answer it, for under the allegations of the indictment the name on the prescription is not appellant's true name, but is assumed, fictitious — false."

In the instant case the allegation is that the defendant "procured to be falsely \* \* \* executed" a prescription, and that it was falsely executed because "it contained a false and fictitious address". This language paraphrases the holding of the *Hart* case.

The sole question being the sufficiency of the indictment, and the indictment clearly charging the defendant with a crime, and the sentence imposed being within the limits fixed by the Statute, the decision of the District Court should be affirmed.

Respectfully submitted,

J. CHARLES DENNIS  
*United States Attorney*

HARRY SAGER  
*Assistant United States Attorney*

No. 11874

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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In the Matter of

CHRIST'S CHURCH OF THE GOLDEN RULE, a California Non-Profit  
Religious Corporation,

*Bankrupt,*

PETER PETERSEN, MRS. PETER PETERSEN and  
GEORGE D. PATRICK,

*Appellants,*

*vs.*

PAUL W. SAMPSELL, L. BOTELER and MCINTYRE FARIES, as Trus-  
tees in Bankruptcy of the Estate of Christ's Church of the  
Golden Rule, Bankrupt, and CHRIST'S CHURCH OF THE  
GOLDEN RULE, Bankrupt,

*Appellees.*

---

## APPELLANTS' OPENING BRIEF

---

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JUL 22 1948









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No. 11874

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CHRIST'S CHURCH OF THE GOLDEN RULE, a California Non-Profit  
Religious Corporation,

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PETER PETERSEN, MRS. PETER PETERSEN and  
GEORGE D. PATRICK,

*Appellants,*

*vs.*

PAUL W. SAMPSELL, L. BOTELER and MCINTYRE FARIES, as Trustees in Bankruptcy in the Estate of Christ's Church of the Golden Rule, Bankrupt, and CHRIST'S CHURCH OF THE GOLDEN RULE, Bankrupt,

*Appellees.*

---

## APPELLANTS' OPENING BRIEF

---

### Statement of Jurisdiction

This is an appeal from an order of the District Court, Southern District of California, Central Division, denying the appellants' (individuals in the religious society) motion to set aside the adjudication in bankruptcy of Christ's Church of The Golden Rule, a California non-profit religious

association, the temporal agency for the religious society of the same name.

An appeal in bankruptcy is a matter of right where it does not directly involve any sum of money within the meaning of Sec. 24a. (11 USCA 47a)

*England v. Nyhan*, 9 Cir. 141 F. 2d 311

*Winton Shirt Corp.*, 3 Cir. 104 F 2d 777

### Statement of Facts

A motion was made before the District Court by the three appellants to set aside the adjudication in bankruptcy, upon two separate and distinct grounds:

1. Jurisdiction to adjudicate the corporate temporal agency of the religious society a bankrupt; (adjudication void ab initio).

2. Abuse and perversion of the adjudication which has amounted to a violation of Freedom of Religion, First Amendment, United State Constitution, (adjudication set aside as to future acts, but not effecting validity of past acts of administration).

Under the jurisdictional point, there are several separate and distinct grounds:

1. A church corporation under California law holds property as the agent of and manages it for the interests of the ecclesiastical or spiritual body, under an express trust as though declared by deed.

In the instant case, the corporate temporal agency was more than solvent having \$2,600,000 assets and \$111,000 general creditors had some differences between its president (corporate official) and the state Attorney General, and as a result a receivership was sought in the State Court, and granted. The corporate president then sought to carry on the fight and differences with the State officials by filing a Chapter XI proceedings on November 1, 1945. During the hearings in the District Court, the temporal corporate officials filed a voluntary petition in bankruptcy and the adjudication was made November 18, 1945. It is contended that the corporate temporal agency could not throw the corpus of the trust into bankruptcy over a mere difference with some public official from the very nature of the religious trust without the consent of the spiritual body and without the consent of the members of the corporation.

2. It is the contention of the appellants that their religious society and its property could not be put under the control and direction of a bankruptcy court, nor could a bankruptcy court be invested with ecclesiastical jurisdiction, nor could the management of a solvent religious society's financial matters be put in the hands of two professional bankruptcy liquidators and an owner of a brewery (none of whom had any religious sympathies with the Church). Any statute that would



permit this would to that extent be unconstitutional as a violation of the First Amendment, United States Constitution, Freedom of Religion. Certainly without the consent of the religious society or of those in it, by a decree of forfeiture of the Church assets, it would be clearly unconstitutional.

3. Neither the religious society nor those in it consented to a decree of forfeiture of some \$2,600,000 for a mere \$111,000 of liabilities. Without this consent the officials of the corporate temporal agency could not do so by petitioning for a voluntary adjudication. No consent of the membership was ever sought or obtained at any time.

4. The testimony of the corporate president, Mr. Bell, and of his counsel Mr. Utley showed that the petition for bankruptcy proceedings was intended as a means of seeking religious freedom from a religious persecution. It also shows that the difference between a Chapter XI proceedings and a voluntary bankruptcy was believed by the temporal agency officials to be much the same. The reality of consent, the understanding of the nature of an adjudication in bankruptcy and the consequences including the forfeiture of all property of the Church free of its religious uses and the loss of some \$2,600,000 of the religious society's property

to satisfy only \$111,000 of debts, was wholly lacking.

The second and distinct grounds was that of the abuse and perversion of the adjudication decree by its misuse as an instrument of religious persecution. The offer of proof was made on behalf of the appellants and the District Court denied the motion upon the grounds that abuse of the court's process was not grounds for the Court to interfere by this remedy.

The facts of the religious persecution are strong, and one part of it has already been before this Court. We would like to draw the Court's attention to a prior proceeding in this Court, No. 11,472, *Bell v. Sampsell, et al.*, and particularly to Appellant's Reply Brief therein, pages 12 to 14, where similar matters are touched upon.

The offer of proof involved the following:

(a) A rule of procedure was established in the administration of the estate known as the "White Case" wherein the religious beliefs of the society were declared and held fraudulent for want of judicial proof of the truth of the beliefs! This was a heresy trial as defined in *U. S. v. Ballard*, 322 U. S. 78. As a consequence any one who would become a "dissenter" and would renounce his or her religious beliefs would have a preferred claim in the estate, any property claimed in the estate, and

even compensation for his or her time even to attending religious instruction!

(b) It was a stated policy of the Trustees in Bankruptcy in the administration of the estate, not once but on several occasions, in clear and unmistakable language that a separate and distinct rule of both procedure and law would be applied in the same case to various individuals depending upon whether the individual would renounce the religious beliefs of the Church and disassociate with others in the religious society, or whether the party held the same religious beliefs as the others in the society. *We believe we have the strongest possible statement of a religious persecution.* If one be a “dissenter” he is entitled to such property as he may wish to claim from the estate, and help in obtaining it from the Trustees in Bankruptcy and their counsel. Upon solely the basis of religious beliefs—those who retained the religious beliefs of the Church—are termed “loyalists” and they are subjected to a religious persecution, and haled into the Bankruptcy Court for inquisitions as to their religious beliefs, their property, their earnings and services after bankruptcy adjudication, claimed to be forfeited to the Trustees in Bankruptcy to be taken without compensation, and to be stripped of their property in the Bankruptcy Court upon no more proof than membership in the Church!

If there be any question as to the administration,



the extracts of the statements of trustees counsel appear in the record. The Referee stated the policy of the Trustees that the petitions in reclamation of those who have definitely severed their connections with the Church shall be governed by the White Case (Tr. 14, Nov. 1947, pg. 31), to which counsel for the Trustees agreed. The trustees permitted a "dissenter" to have an automobile from the bankruptcy estate without even a petition in reclamation and Mr. Hunt, counsel for the Trustees, explained the Referee applied the doctrine of the White Case because she promptly disassociated herself from the Church and all people connected with it (Tr. 14, Nov. 47, pg. 31-2). Mr. Martin, another attorney for the Trustees, stated that the White Case could not apply to the appellant Petersen as he had not withdrawn from the "ecclesiastical society"; and Judge John W. Preston who represented a Mr. Miller found that his clients could not contest title to a ranch because they had not severed connection with the Church organization by withdrawal or otherwise. (Tr. 14, Nov. 47, pgs. 29-30). Mr. Martin, attorney for the Trustee on page 30 of Tr. Nov. 14, 1947, stated that the price of Mr. Petersen's right to contest title to his own property is that he rescind his relationship with the Church.

In the combined proceedings before the District Court on 14 November 1947, involving Petersen

and Patrick and their motion now before this Court, Mr. Hunt as attorney for the Trustees in Bankruptcy made himself amply clear on the religious persecution:

1. On page 3a of Transcript of 14 Nov. 48 he stated:

“There is nothing in the record to show that Patrick ever repudiated any of these religious beliefs. The answers do not show that he completely severed himself from the Church or that he expects to do so in the future”.

2. On page 7a of Tr. 14 Nov. 48, Trustees counsel said:

“He did not directly charge Bell or the church with fraud, but he tried to stand in the shade of the White Case, where there were different parties and different circumstances, and said, because in that case a referee held that there was fraud and the facts there showed that these parties promptly severed all connections with the church and had nothing further to do with it, yet Patrick said, “Well, because that happened in that case, I am entitled to get my property back”. Now, that is the sum and substance of all this argument up here.

The Court: There was nothing to prevent Patrick from saying, “I believe the doctrine of the church but I think Bell defrauded me or the church defrauded me”, is there?

Mr. Hunt: But he does not repudiate the doctrines. He is willing to accept them.

The Court: What difference does that make?

Mr. Hunt: The record shows that Patrick still believes those doctrines in spite of anything that Bell or anybody said.

The Court: What difference does that make? He could still be defrauded by Bell, could he not?

Mr. Hunt: But anybody could condone fraud, your Honor; and if fraud is committed, you are not ipso facto to get your property back. You have got to show that you have cancelled and you want to quit. But if you condoned it as to any false statements and do nothing about it, you have condoned the fraud. A man can't blow hot and cold at the same time, your Honor.

The Court: Would it be your position that the man would have to quit the church in order to rescind?

Mr. Hunt: I think he would have to quit the church in order to get his property back.

The Court: Renounce the beliefs of the church?

Mr. Hunt: Yes, sir. In other words, that is the very distinction between dissenters and loyalists.

Mr. Crittenden: That is right, your Honor.

The Court: I think that is too rough a distinction, myself.

Mr. Crittenden: I do, too.

Mr. Hunt: It might be.

The Court: I do not see any inconsistency in a man saying that "I believe Bell is a scoundrel. He defrauded me. But I believe the church or the tenants of the church are sound and good and pure." Is there any legal obstacle to his saying that?

Mr. Hunt: Well, but how could he be defrauded if he believes in the beliefs of the church which Mr. Bell believes? That is the point . . ."



We believe that this shows beyond any question of doubt that a “fraud” basis is made in the White Case solely upon religious beliefs; that those who renounce the beliefs of the Church and disassociate themselves from the Church are treated as victims of fraud with the preferred position of one rescinding for fraud; that those who continue to believe the beliefs of the Church have condoned the fraud. That a distinction in the same case is made between persons depending wholly upon their *religious beliefs*.

(c) Appellants offered to prove an inquisition under Sec. 21a or 21j almost daily for the first year and a half of the administration and almost entirely of those who were loyal members of the religious society; that it was used as a basis of religious discrimination based upon religious beliefs. Prior to the motion in the District Court, appellant Petersen was the subject of a 21j inquiry as to his religious beliefs, by Mr. Hunt, attorney for the Trustees.

(d) Appellants offered to prove that summary proceedings were used, and procedure and substantive rights applied upon the basis of religious beliefs; those who adhered to the religious beliefs of the religious society had a different rule and law applied than those who departed from and renounced their religious beliefs and disassociated themselves from the religious society.

(e) Appellants offered to prove that the temporal affairs of the religious society were put into the hands of two professional bankruptcy liquidators and a man who ran a brewery; that none had any sympathy with the organization religious beliefs, and one of the counsel made derogatory remarks about the religious teachings.

(f) Appellants offered to prove an initial inventory of assets in the religious society of \$2,600,000 at bankruptcy; that up to the middle of 1947 the administration in bankruptcy showed cash expenditures of \$2,207,936.38; that up to the middle of 1947 costs of administration, attorneys fees, salaries and overhead of the administration was \$266,089.09; and the value of the estate had wasted to approximately \$661,000 of value; that the actual allowed claims of general creditors is \$111,364.79 and not one cent has ever been paid in dividends, nor is there any indication that it will be paid until the trustees are through with their handling of tax matters; that a claim of \$900,000 of Federal taxes was suggested to be settled by General Counsel of the Treasury for \$125,000 and finally settled for \$130,000 plus interest; despite the fact that no bona fide effort was ever made by the Trustees in Bankruptcy to bring the Church corporation within Sec. 101(6) or 101(18), an apostolic religious society; and no effort to fight the state tax claim in two years, of the administration of the estate.

(g) Appellants offered to prove that the trustees in bankruptcy solicited donations from the various people in the religious society upon the threat of both the Trustees and the Referee (the Bankruptcy Court) to close up the church lock, stock and barrel, and disburse the religious society if services and gifts were not donated. That all services and income of those in the religious society were claimed as forfeit to the Trustees in Bankruptcy *without compensation* from after bankruptcy adjudication in November 1945 to and including the end of September 1946; to be grabbed and seized by the bankruptcy court and interrogated the individuals under Sec. 21a and 21j of the Bankruptcy Act. The Trustees in Bankruptcy ran the financial matters of the religious society including the religious seminary, collected money and services of the members of the apostolic religious society after bankruptcy. Donations from those in the religious society were sometimes sent in with written directions that they be used for certain religious purposes of the religious society.

(h) Appellants offered to prove that the Trustees in Bankruptcy hired two or three private detectives who went through and searched the personal effects and private papers of individuals in the religious society, took and seized such papers and property of these persons. That the only authority for these acts was a subpoena duces tecum,



without affidavit, for a hearing never held. Religious publications, including religious literature published after November 1945 as late as Christmas time 1946 were seized and the Trustees in Bankruptcy prevented distribution of the literature of the religious society.

The Statement of Points of Appeal are:

1. A continued course of conduct denying and infringing Appellant's rights of religious freedom, First Amendment, United States Constitution, in the administration of the estate in bankruptcy is proper grounds for termination of further administration and further misuse and abuse of the Court's processes; and the District Court erred in refusing to consider any such conduct, abuse and misuse of the Court's process for termination of further religious persecution.

2. The bankrupt was a solvent temporal agency of a religious society at the time of adjudication in bankruptcy, and held its property upon a religious trust for the ecclesiastical and religious society; and an adjudication of the trustee of the religious trust should not effect the religious trust, nor is the corporate temporal agency by itself a proper subject of adjudication in bankruptcy.

3. That the Directors of the corporate temporal agency for the ecclesiastical and religious society had no authority to file a voluntary petition in bankruptcy; and there was no evidence nor show-

ing they did, either as directors, or by the ecclesiastical church government, or with any consent of any membership.

4. That there was no reality of consent by the president of the corporate temporal agency, in that he did not understand the nature and character of the proceedings in bankruptcy.

5. That the adjudication in Bankruptcy is being used as an instrument of religious persecution in violation of the First Amendment, United States Constitution;

6. Findings of the District Court as to the reality of consent of the president of the corporate temporal agency is not supported by the evidence before the Court.

## I.

**A Religious Society Under the Laws of California Holds Its Property by a Temporal Agency in Trust for the Ecclesiastical Body With Power to Control and Manage in the Interests of the Spiritual Ends of the Church, and the Temporal Agency Is a Subordinate Factor in the Life and Purposes of a Church.**

The decisions of both California and the Supreme Court of the United States hold that a church corporation holds its property under a trust for the ecclesiastical body.

*Wheelock v. First Presbyterian Church*, 119 Cal. 477, 51 P. 841, from which we quote:

“The spiritual or ecclesiastical body being

dissolved, what becomes of the money held by the corporation? This question brings before us the consideration of the status of the corporation as relating to the church proper. The Civil Code of this state (original section 595) expressly permits religious bodies to incorporate; but such incorporation is only permitted as a convenience to assist in the conduct of the temporalities of the church. Notwithstanding incorporation, the ecclesiastical body is still all important. The corporation is a subordinate factor in the life and purposes of the church itself. A religious corporation like the one at bar, under the laws of this state, is something peculiar to itself. Its function and object is to stand in the capacity of an agent holding the title to the property, with power to manage and control the same in accordance with the interest of the spiritual ends of the church. It is said in *Winebrenner v. Colder*, 43 Pa. St. 249: 'The legislature never means, by granting or allowing such charters, to change the ecclesiastical status of the congregation, but only to afford them a more advantageous civil status. The directors or trustees of the corporation, as such, have no authority whatever over church affairs. These matters rest purely with the ecclesiastical body. Whatever property stands in its name is seized to the use of the church proper. It is a trustee holding property for the use and enjoyment of the church and every member of the church is a beneficiary of that trust.' 'By the election which organized the corporation, the title became vested in the trustees and their successors, for the use of the trust, as completely as if the use had been declared by deed. \* \* \* A trust of this character is not distinguishable in this from any other trust over which courts of



equity exercise a supervisory power.' *Brunnenmeyer v. Buhre*, 32 Ill. 190."

The Supreme Court of the United States has held that a religious society's property is held under a *trust* for the doctrines of the Church, society, or organization.

*Watson v. Jones*, 80 U. S. (13 Wall) 679, 20, L.Ed. 666

The Supreme Court of California in *Baker v. Ducker*, 79 Cal. 365, 21 P. 764, held that property acquired by a religious society and held by its church corporation was held under a *trust*; and the parsonage obtained by contributions could not be diverted to other uses even though by a majority of the members.

The Supreme Court of California in *Permanent Com. of Missions vs. Pacific S. Presbyterian Church*, 157 Cal. 105, 106, P. 395, recognize that a church corporation holds its property under a religious trust. The Court cited *Watson v. Jones*, 80 U. S. 726, 20 L.Ed. 666, in support of this proposition as well as cited *Watson v. Jones* in the *Baker v. Ducker*, 79 Cal. 365, 21 P. 764 for a similar proposition.

It was said in *Bomar v. Mt. Olive Missionary Baptist Church*, 92 Cal. App. 618, 268 P. 665:

"While not cited as determinative of any questions involved herein, we think the following taken from the opinion of the court in

Wheelock v. First Presbyterian Church, 119 Cal. 477, 51 P. 841, pertinent:

“Notwithstanding incorporation, the ecclesiastical body is still all-important. The corporation is a subordinate factor in the life and purposes of the church proper.”

“In any event, as held in that case, the corporation would be only the agent or instrument for holding title to property and managing its temporal affairs. The ecclesiastical body would still remain the real church. Under the circumstances disclosed, we think, in the present case, the unincorporated religious association known as the Mt. Olive Missionary Baptist Church at all times constituted the body entitled to control both its ecclesiastical and temporal affairs, and that the incorporation never acquired any legal or ecclesiastical right to the control of either of them.”

It is the established law of California:

1. That a church corporation organized under the laws of California is something peculiar unto itself.

2. Incorporation is permitted only as a convenience in the temporalities; and incorporation does not effect the religious body which remains all important;

3. The function and object of a church corporation is to hold and manage property in accordance with the interest of the spiritual ends of the church.

4. Whatever property a Church corporation holds, it holds subject to a trust for the use and

enjoyment of the Church and every member of the Church is a beneficiary of the trust.

5. A Church corporation holds all its property subject to a trust as if declared by a deed. This trust is not distinguishable from any other trust supervised by the courts of equity.

The trustees in bankruptcy do not acquire title to property, the legal title to which is in the bankrupt as trustee; the trustees in bankruptcy are not entitled to property in the possession of the bankrupt which is held under an implied trust, or to which a constructive trust attaches.

*8 C. J. S. 653, Bankruptcy Sec. 193d*

*In re Finkelstein*, 2 Cir., 33 F. 2d 278

*I re Interstate Pipe Co.*, 15 F. 2d 61

*Guarantee B. & Mtg. Co. v. Hilding*, 6 Cir.  
290 F. 22

*In re Heintzelman Const. Co.*, 34 F. Supp 109,  
the Court said:

“Property impressed with a trust continued so impressed in the hands of the trustee. Whatever title he took was subject to the valid claims and equities which might have been asserted against the bankrupt. *In re Branon*, 5 Cir., 62 F. 2d 959; *Martin v. New York Life Co.*, 7 Cir., 104 F. 2d 573; *Union Trust Co. v. Townshend*, 4 Cir., 101 F. 2d 903; *Hurley v. Atchinson, Topeka & Santa Fe Ry.*, 213 U. S. 126, 29 S. Ct. 466; 53 L. Ed. 729; *Zartman v. First National Bank*, 216 U. S. 134, 30 S. Ct. 368, 54 L. Ed. 418.”

Despite this well established rule of law, the



Trustees in Bankruptcy and the Bankruptcy Court have seized and taken the trust property, in total disregard of the trust, and conducted the religious persecution.

In view of the well established law of church corporations, no temporal agency can petition for Chapter XI, nor for voluntary bankruptcy without the consent of the beneficiaries of the religious trust—the ecclesiastical body and the persons who are members of that ecclesiastical body. Certainly they cannot by a voluntary petition in bankruptcy institute a decree of forfeiture of some \$2,600,000 of property for debts of \$111,000 merely hoping to escape a religious persecution (but they got into a worse one) or merely because of a dispute between the temporal agency's president and some state official.

The decree of adjudication is a decree of forfeiture of all property of the bankrupt.

1 *Cooley's Blackstone* (3rd Ed.) pg. 492 (Vol. II, pg. 283)

Certainly, no temporal agency who is solvent, not embarrassed by debt, but only seeking "protection" of the Federal Courts as the testimony of both Mr. Utley and Mr. Bell show in the transcript can without the consent of the spiritual body or any person or persons in it, convey over two and a half million dollars of property held under a religious trust by any means—by transfer or a voluntary decree of forfeiture.

## II.

### **The Court Will Not Permit Its Processes or Judgment of Adjudication in Bankruptcy to be Misused.**

The record shows an exceedingly strong set of facts of a misuse, abuse and perversion of the Court's processes and judgment of adjudication in a religious persecution without precedent in the reported decisions of American Jurisprudence:

1. A *heresy trial* (as the term is used in *U. S. v. Ballard*, 322 U. S. 78) based upon religious beliefs; jurisdiction arises from the adjudication in bankruptcy.

2. Two professional liquidators and an operator of a brewery, none who hold comparable religious sympathies were put in charge of and ran a Church with its seminary, etc., for almost a year after the adjudication, solely upon and by color of the adjudication.

3. A course of conduct of extensive inquisitions under Sec. 21a of the Bankruptcy Act were held over a year and a half period aimed against these remaining loyal to the beliefs of their religion. Bankruptcy law permits a broad inquisition, copied after the famous Roman jurisprudence, (and used in the famous Spanish Inquisition) concerning any acts, conduct or property of the bankrupt. The sky is the limit in this inquisition. Adjudication in bankruptcy is the basis for judicial process to be used for these inquisitions.

4. A course of conduct of suppression of the religious literature its seizure and effective throttling. Again the adjudication is the right upon which claim is made to all religious literature whether composed or published before or after the adjudication.

5. A course of conduct of searches and seizure, without color or right of the personal papers of those belonging to the religious society. A double outrage both of an unlawful searches and seizure and of unlawful suppression of religious literature, only possible by reason of the adjudication.

6. Heresy trial of the beliefs of the religious society, determination of church membership, and exercise by summary jurisdiction of forfeiture of property for religious beliefs and affiliations. All based upon and stemming from the adjudication in bankruptcy.

7. A course of conduct of running a church, claiming all money and property and services of those having religious beliefs and church affiliations; all based upon the adjudication.

8. A course of conduct of embroiling the estate in tax litigation, and failure to make any bona fide attempt to wind up the litigation or plead tax laws applicable—Sec. 101(6) and 101(18). Adjudication gives the trustees in bankruptcy the sole control and conduct of all these matters and litigation, and the bankruptcy court jurisdiction.



9. An administration of over two and a half million dollars of the Lord's purse, with enormous administrative expenses, and not one cent paid as a dividend to general creditors. It is the adjudication which is the decree of forfeiture of this property and the authority for this outrageous and scandalous conduct.

10. A course of conduct where different rules of substantive law and procedure are applied based upon the religious beliefs of the parties in the same litigation; not by one counsel but by two; not on one occasion but by two. The adjudication is the basis for the exercise of this ecclesiastical jurisdiction by the referee in bankruptcy.

The Court will not permit its powers to be exercised in the aid of a fraud, or for improper purposes.

*Zeitinger v. Hargadine McKittrick Dry Goods Co.*, 8 Cir., 244 F. 719

The *Zeitinger Case* rule was quoted with approval by the Ninth Circuit in *Mount Vernon Hotel Co. v. Block*, 157 F. 2d 637, in which the Court quoted:

“ \* \* \* we further realize that ‘the District Judge, in adjudicating upon a voluntary petition in bankruptcy, is not a ministerial, but a judicial, officer, whose first duty is to see that those who minister in the temple of justice shall not invoke his authority for the accom-

plishment of a fraud,' *Zeitinger v. Hargadine-McKittrick Dry Goods Co.*, 8 Cir. 244 F. 719."

The bankrupt court may under certain circumstances refuse to assume or retain jurisdiction where it appears the court is being used in connection with improper purposes.

*Smith v. Chase Nat. Bank of City of N. Y.*,  
8 Cir. 84 F. 2d 608

The Ninth Circuit in *In re Fox West Coast Theatres*, 88 F. 2d 212, indicated that a bankruptcy adjudication could be set aside as to future or prospective matters. In the opinion of the Court it was indicated that the remedy was proper where the bankrupt had not authorized the petition, or where the Court had no jurisdiction, or to prohibit a fraudulent party from reaping the fruits of a fraudulent judgment. Misuse of the court's adjudication does not effect jurisdiction, but merely goes to further proceedings.

Under the instant case, the "loyal" persons in the religious society, under the advice of their counsel Judge John W. Preston, would be in a position to pay all just debts; the persecution would be stopped, and the adjudication declared naught. There is no indication, after more than two years of the type of conduct the record shows, that if the present adjudication is permitted to stand, the general creditors will ever receive anything. Certainly out of \$2,200,000 of cash dis-

bursed in a year and a half of administration, not one cent was paid to tax claimants or to general creditors; and there is no prospect of any dividend being paid. Certainly in the interest of creditors, no argument can be propounded to uphold the adjudication. Certainly in the interest of religious freedom or administration of justice can no argument be propounded for the adjudication.

In granting a motion to set aside an adjudication in bankruptcy the 7th Circuit said in *In re Gareau*, 127 F. 677:

“But aside from that, it would be the duty of the court sua sponte, when it is led to believe that its jurisdiction has been imposed upon, to inquire into the facts by some appropriate form of proceedings, and for its own protection against fraud or imposition, to act as justice may require.”

The Second Circuit in *In re Ettinger*, 76 F. 2d 741, in upholding an order setting aside an adjudication in bankruptcy held that when the court believes its jurisdiction has been imposed upon, it can act sua sponte on its own motion, or any interested person.

It was held in *In re E. C. Denton Stores Inc.* (DC-Ohio) 5 F. Supp. 307, that the adjudication in bankruptcy was judicial and not a ministerial act, and it was the court's duty to see those who minister the temple of justice shall not invoke



it to accomplish a fraud; and vacated the adjudication.

In *In re Associated Oil Co.* (DC-La) 271 F. 788, it was held that the bankruptcy court would not permit its agency to be misused and annulled the adjudication.

Even if there were jurisdiction, and the temporal agency could submit its property to a decree of forfeiture without the consent of the spiritual body or those in it:

(a) The court cannot sit idly by and permit its temple to be misused in a religious persecution, particularly of the kind shown in this record.

(b) If there ever were anything that would appeal to the conscience of the Chancellor it would be the cry of help of the persecuted in a religious persecution shown in this record, from the harsh heel of the bankruptcy gang.

(c) The Court can act *sua sponte*, of its own motion, to prevent such misuse of its temple.

(d) The Court can annul the adjudication to prevent any future misconduct or misuse of its process; and save the persecuted from further torments on the rack of the inquisition, stop further exercise of ecclesiastical jurisdiction by the bankruptcy referee, stop further squandering of money of the Lord's Purse by the professional liquidators in bankruptcy in the conduct of the religious per-

secution, save those who adhere to beliefs of their own choosing from being stripped in bankruptcy summary proceedings, save some vestige to the meaning of religious freedom in this nation. The Court is not powerless. It can act *sua sponte* upon the facts in the record if for any reason the present remedy does not appeal to the chancellor.

### III.

#### **There Was No Jurisdiction to Adjudicate the Temporal Agency a Bankrupt.**

1. A temporal agency—particularly a California church corporation—holds its property under a trust for the benefit of the spiritual body and those in it. This has been covered in detail. A trustee in bankruptcy does not take title or possession to any property held by the bankrupt under a trust, express, implied or resulting or constructive for another. From its very nature, it could not be adjudicated a bankrupt. Certainly under the Constitutional guarantee of religious freedom, the ecclesiastical society cannot be adjudicated a bankrupt. Nor could the individuals in a religious society be adjudicated bankrupts upon the petition of any other individual or person, solely by reason of religious affiliations.

2. A temporal agency—particularly a California church corporation—is subservient to the ecclesiastical body and organization, and it but acts for the spiritual body in temporal matters. It exists as

a convenience in temporal matters. Certainly, while solvent it cannot by any voluntary act—by deed or decree of forfeiture—surrender \$2,600,000 of assets in its trust for \$111,000 of general creditors. Any trustee who should do so, would be held to have acted beyond the power of the trust and the act upon its face so shocking to any court as to treat it as a nullity. Certainly without the express consent of the beneficiaries of the trust, any transfer would but at most pass bare legal title and the party taking it would take with notice as effective as though the trust were created by deed. Certainly without the express consent of the true owners, the spiritual body and those in it, no attempted conveyance whether by deed or by decree of forfeiture would be valid. Any attempt of the corporate temporal agency by its president or by its board or both to confer jurisdiction for a decree of forfeiture of some \$2,600,000 of property for some \$111,000 of debts is so shocking and beyond their powers as to be void upon its face. Certainly when it appears this was done in an attempt to avoid a religious persecution, only to jump from the frying pan into the fire, and upon a mistaken belief as to the nature and character of a bankruptcy adjudication, and a mistaken belief that bankruptcy had any consideration for the bankrupt or for any religious society or that bankruptcy would be conducted other than according to its reputation



among the practicing bar or the general public; and done by the President of the temporal agency in personal differences he was having with some state official, no one can contend that jurisdiction was conferred for such an adjudication—a decree of forfeiture. No agent could have this authority. Certainly no temporal agency for a religious society under the California decisions has such authority. Under *Baker v. Ducker*, 79 Cal. 365, 21 P. 764, a religious corporation could not use a house and lot acquired for a parsonage for other uses, even if consented to by a majority of the members.

A president of a commercial corporation cannot file a voluntary petition in bankruptcy without the consent of the corporation.

*In re Community Book Co.* (DC-Minn) 10 F. 2d 616

*In re So. Steel Co.* (DC-Ala) 169 F. 702

*Regal Cleaners & Dyers v. Merlis*, 2 Cir., 274 F. 915

*In re Jefferson Casket Co.* (DC-NY) 182 F. 689

It is the Ninth Circuit rule that where there is a restrictive statute in the state requiring stockholders to consent to a transfer of all of the assets, that a voluntary petition in bankruptcy must be made by the officials of the corporation with a duly authorized resolution of the board of directors authorizing the acts, and a majority of the stock-

holders of the commercial corporation must consent in writing.

*Rudebeck v. Sanderson*, 9 Cir. 227 Fed. 575

*In re Crystal Ice & Fuel Co.* (DC-Mont) 283 F. 1007, it was said:

“It is settled law in this circuit that in view of statutes like those of this state of the company’s incorporation, power to express this willingness (to be adjudicated bankrupt) is with the stockholders, and not with the directors. See *in re Quartz Gold Mining Co.* (DC-Ore) 157 F. 243, affirmed in *Van Eamon v. Veal* (1908) 158 F. 1022, 85 CAA 547; *Bell v. Blessing* (Cal. 1915) 225 F. 750, 141 CAA 34, *Rudebeck v. Sanderson* (Wash. 1915) 227 F. 575, 142 CAA 207.”

And where it does not appear that the by-laws were followed in calling a stockholders’ meeting, the adjudication in bankruptcy by a voluntary petition was vacated.

*In re Campbell County Hardware Co.*, 15 F. 2d 78

And where the stockholders meeting was held without notice, the voluntary petition in bankruptcy was void and the adjudication vacated; and although stockholders can ratify acts of corporate officials, they cannot ratify and make valid an adjudication on an invalid petition.

*In re Mississippi Valley Util. Corpor.*, 2 F. Supp. 995

A non-profit corporation is governed in such mat-

ters by the general corporation laws in the code.

*CC 605d* (California law in November 1945)  
Now Corpor. Code 9002

General corporation law in effect in California in November, 1945, prohibited transfer of all of the assets of a corporation without the written consent of the stockholders.

*CC 343*, formerly 361a; now Corporation Code, Sec. 3901-2

This law, when numbered CC 361a was construed to prohibit and make *void* a sale by a corporation of all its assets where there was *no proof* of a consent by the shareholders.

*Porter v. Anglo & London Paris Bank*, 36 Cal. App. 191, 171 P. 845, in which it was said; quoting from *So. Pasadena v. Pasadena. Etc. Co.*, 152 Cal. 581, 93 P. 490:

“This enactment (CC 361a) is not, on its face, a mere negative or prohibitive statute, forbidding that which before was permitted. It is both affirmative and negative in its terms. \* \* \* It expresses a consent to such transfer in the manner prescribed, as well as prohibition against such transfer in any other mode. \* \* \* It provides ordinary business corporations of the power they previously possessed to dispose of their entire property, franchises, and business, as a whole at the will of a mere majority of the stockholders, or of less than two-thirds of them \* \* \* ”

“In the absence of a showing that such a



sale was consummated in conformity with the statutory requirements, the trial court correctly concluded it was void as against the plaintiff \* \* \* ”

In the instant case the record shows that there was never any consent of any members of any kind at any time to the filing of any proceedings in bankruptcy, either the original Chapter XI or the voluntary petition.

Where it appears that there is no jurisdiction, it is the duty of the Court to go no further, but to dismiss the adjudication and proceedings.

*Morris v. Gilmer*, 129 U. S. 315, 9 S. Ct. 293,  
32 L. Ed. 690

Where there is no jurisdiction to adjudicate a bankrupt, the Court may act sua sponte and dismiss the action over which it has no jurisdiction. Jurisdiction can be raised at any time during litigation.

*Finn v. Carolina Portland Cement Co.*, 5  
Cir. 232 F. 815

If drawn to the court's attention, that the adjudication in bankruptcy is a nullity, the court is bound to protect its jurisdiction on its own motion, and vacate the adjudication.

*In re Vassar Foundry Co.*, 293 F. 248

The bankrupt cannot waive the jurisdiction of the court, and thus give jurisdiction where there is none.

*In re Amer. & British Mfg. Corpor.*, 300 F.  
839

It is the duty of the court to determine for itself if it has jurisdiction, for neither consent, waiver nor estoppel can give jurisdiction or permit it to proceed.

*Woolsey v. Security Trust Co.*, 5 Cir. 74 F. 2d, 334

The Supreme Court of the United States in *Valley v. Northern F. & M. Ins. Co.*, 254 U. S. 348, 41 S. Ct. 116, 65 L. Ed. 297, set aside an adjudication in bankruptcy 17 months after the adjudication upon motion of the bankrupt, even where the bankrupt's officials aided the court and trustees in the administration of the estate. The court held there was no estoppel. In that case it was held:

“Courts are constituted by authority, and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as a nullity. They are not voidable, but simply void, and this even prior to reversal.”

We believe the record amply supports any one of the following grounds as determinative by itself irrespective of any other that there was no jurisdiction:

1. There was no reality of consent by the Presi-

dent of the temporal agency, to place the temporal agency of the Church into bankruptcy.

2. There was no consent by the spiritual body or any of its members to the temporal agency, a solvent trustee of a solvent trust, to any adjudication in bankruptcy.

3. There was no consent by any members of any kind to the alleged acts of bankruptcy and the filing of the voluntary petition.

4. A temporal agency—a California church corporation—by its very nature is not the proper subject of an adjudication in bankruptcy. Certainly not with \$2,600,000 assets, and \$111,000 of general creditors.

5. Religious liberty and the Constitutional guarantee of the First Amendment is such that no bankruptcy court should undertake to administer a church. In the reported cases, although we have searched diligently, we can find no decision or written reference to nor any rumor of any church heretofore being adjudicated a bankrupt or of any bankruptcy court undertaking any matter with or concerning any church. We trust this honorable Court will by its decision prevent a repetition of this horrible persecution, perversion of the court's processes and scandalous administration, that no other Church may have to bear such suffering nor any other religious group such indignities.



#### IV

**The First Amendment, Freedom of Religion, Is the Highest of the Personal Rights Guaranteed by the Bill of Rights, and the Judicial Arm of the Government Through the Bankruptcy Courts Cannot Violate This Right of Religious Freedom.**

The United States Supreme Court in the recent Land Covenant Cases has held that the judicial arm of the government cannot be invoked to transcend any of the individual personal rights guaranteed and established by the Constitutional Bill of Rights.

*Hurd v. Hodge* (May 3, 1948) 92 L. Ed. (Adv. Sheets) 857, 68 S. Ct. (Adv. Sheets) 847

*Shelly v. Kraemer*, 68 S. Ct. (Adv. Sheets) 836, 92 L. Ed. (Adv. Sheets) 847

It was said in *Everson v. Bd. of Edu. of Ewing*, Tp. 67 S. Ct. 504:

“The ‘establishment of religion’ clause of the First Amendment means at least this: \* \* \* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and visa versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between the Church and State’ \* \* \*”

The Supreme Court in holding that religious freedom transcends the right of the state to require

its citizens to actively bear arms said in *Girouard v. U. S.*, 328 U. S. 61, 66 S. Ct. 826, 90 L. Ed. 1084:

“The victory of freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the state. Throughout the ages men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle. As we recently stated in *United States v. Ballard*, 322 U. S. 78, 86, 88 L. Ed. 1148, 1154, 64 S. Ct. 882, ‘Freedom of thought, which includes freedom of religious beliefs, is basic in the society of free men. *West Virginia State Board of Edu. v. Barnette* 319 U. S. 624, 87 L. Ed. 1628, 147 ALR 674.’ The test oath is abhorrent to our tradition.”

The Supreme Court said in *U. S. v. Ballard*, 322 U. S. 78, 64 S. Ct. 882, 88 L. Ed. 1148:

“But on whichever basis that court rested its action, we do not agree that the truth or verity of respondents’ religious doctrines or beliefs should have been submitted to the jury. Whatever this particular indictment might require, the First Amendment precludes such a course, as the United States seems to concede. ‘The law knows no heresy, and it is committed to the support of no dogma, the establishment of no sect.’ *Watson v. Jones*, 13 Wall 679, 728, 20 L. Ed. 666, 676. The First Amendment has a dual aspect. It not only ‘forestals compulsion by law of the acceptance of any creed or practice of any form of worship’ but also ‘safeguards the free exercise of the chosen form of religion.’ *Cantwell v. Connecticut*, 310 U. S.

296, 84 L. Ed. 1213, 1217, 60 S. Ct. 900, 128 ALR 1352. 'Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be.' *Id.* 310 U. S. pp. 303, 304, 84 L. Ed. 1217, 1218, 60 S. Ct. 900, 128 ALR 1352. Freedom of thought, which includes freedom of religious belief, is basic in the society of free men. *West Virginia State Board of Educ. v. Barnette*, 319 U. S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178, 147 ALR 647. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to the followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They cannot be put to proof of their religious doctrines or beliefs.'

"The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position. Mur-



dock v. Pennsylvania, 319 U. S. 105, 87 L. Ed. 1292, 63 S. Ct. 870, 891, 146 ALR 81. As stated in Davis v. Beason, 133 U. S. 333, 342, 33 L. Ed. 637, 639, 10 S. Ct. 299 'With man's relation to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure peace and prosperity, and the morals of its people, are not interfered with.'

The Supreme Court in *Watson v Jones*, 80 US 679, 20 L. Ed. 666, recognized that the basic heritages of religious freedom of this nation prevented the secular courts from inquiring into or adjudicating upon any ecclesiastical or religious matters; stated the English rule to the contrary, but refused to follow it because of freedom of religion.

The Constitutional Bill of Rights including Freedom of Religion precludes the adjudication in bankruptcy of any religious society. Any statute that would sanction or permit such a judicial interference with religious liberty is to that extent unconstitutional. Any statute, law or custom that would permit two professional bankruptcy liquidators and a brewery operator with no religious sympathies for the Church at bar to meddle, touch or concern themselves with the religious society is clearly unconstitutional. Any statute that would permit the judicial arm of the Federal Government, through its bankruptcy court, to transcend

the rights of religious liberty is to that extent unconstitutional. Any acts of the Federal Government, whether through the judiciary or its officers known as Trustees in Bankruptcy that would participate in the affairs of Christ's Church of The Golden Rule, would to that extent be unconstitutional. Any adjudication that would justify or permit inquisitions as to acts or conduct of the religious society is to that extent unconstitutional, and certainly any inquiry as to religious affiliations or beliefs are clearly a persecution, for no judicial body can inquire of any persons religious beliefs or church affiliations. The very nature of bankruptcy and its administration and its inquisitorial powers are such that any religious organization, that could be adjudicated a bankrupt can be persecuted, crushed and destroyed as the case in bar shows.

The record shows by statements of counsel for the Trustees the extent to which the administration had degenerated. A heresy trial was held and for want of judicial proof of the truth of or falsity of certain religious beliefs, they were held fraudulent. The instrument of the inquisition and persecution was forged. It was and is now being applied by those who would renounce their Church and this beliefs as fraudulent would have the right to rescind and withdraw from the society and as a consequence would have the help of the Referee, the Trustees and their counsel to any property and

any claim, even for their time in attending religious instructions! Those who would not renounce their Church and religious beliefs as fraudulent and promptly disassociate themselves from the religious society would have a different rule of law, substantive and procedure, applied. The Bankruptcy court would openly inquire and determine their religious beliefs and church affiliations. Summary proceedings in bankruptcy is the scene of this shameful proceedings. Upon proof of religious beliefs and affiliations, the unfortunate would be stripped of his property! If he objected, pressure shown in the record would be used. He had not renounced his religious beliefs, and thus he could not contest title to his own property, and would be enjoined from taking his own earnings from his own business pending the litigation! The record shows this clearly!

A religious society with our concepts of religious liberty just does not mix with bankruptcy proceedings calculated to deal with possibly dishonest debtors attempting to conceal property.

The trustees in bankruptcy, from the Lord's Purse which they have seized, undertake and finance the persecution. They hire full time paid keepers to impound literature of the religious society and prevent its circulation. How much stronger these facts are than *Cantwell v St. of Conn.*, 310 US 296, 60 S. Ct. 900, 84 L. Ed. 1213 and *Tucker v St. of Tex.* 326 US 517, 66 S. Ct.



274, 90 L. Ed. 274. The Trustees in Bankruptcy with the Lord's Purse they seized, hired paid detectives to search and seize the private papers in the possession of those in the religious society. A more ghastly act would be hard to imagine. It becomes not only inconvenient and costly to hold the beliefs—for the property and earnings of the believers (loyalists) are seized—but they cannot safely even study and read their own religious society's current publications for fear of an unlawful entry and a ransacking and seizure of their personal papers!

This is just not the misconduct of a few individuals, it is the results of a religious society falling into the clutches of the harsh hand and severe practices of the bankruptcy court. A competent trustee, Mr. Faries, was eventually the successor in office of the brewery owner. He tried to intercede as the record shows, but his able efforts came to naught to prevent further persecutions. From the nature of things, religious liberty cannot exist if a Bankruptcy Court with its powers and authority and practices gets its clutches upon a church.

No court under our Constitutional Bill of Rights can exercise ecclesiastical jurisdiction. Yet that is just what a bankruptcy court does exercise when it undertakes to administer the affairs of a religious society.

No person can by laches lose his or her right to religious liberty by not immediately defending an

invasion of one's personal liberties, but waits until the persecution becomes unbearable and evidence to prove the persecution is conclusive beyond a doubt.

No Trustee in Bankruptcy can obtain a perscriptive right to continue a religious persecution through the judicial arm of the Federal Government. Yet that is the very ground urged in the answer to the motion of the oppressed when asking for protection of their rights of religious liberty, First Amendment, and the protection of their Church. As if jurisdiction that never existed could be conferred by estopped or laches! As if property rights acquired with full notice of the rights of appellants were superior to freedom of religion, an individual personal right guaranteed by the Constitutional Bill of Rights. *Hurd v Hodge*, 92 L. Ed. 857, 68 S. Ct. 847. Freedom of religion is the highest and the most favored, and the most jealously guarded of the constitutional rights. No one who has given of his time in war in the services of his country and has learned the relative values of things to personal rights could conceive that money or property could be weighed in the same scales with personal rights, particularly those guaranteed in the Constitutional Bill of Rights. The Supreme Court of the United States has held that they cannot.

We believe that the instant record shows the strongest possible violation of religious liberty

guaranteed under the United States Constitution:

1. An adjudication in bankruptcy of a Church.
2. Exercise of ecclesiastical jurisdiction by a Bankruptcy Court.
3. Condemnation and persecution of a whole society for heresy.
4. Continued religious inquisitions not heretofore equalled by precedent in this nation.
5. Seizure and conduct of a religious society by outsiders not in sympathy, and a course of conduct of solicitation of donations after bankruptcy, and running of the temporal affairs of the Church.
6. Unlawful search and seizure of individuals because of religious beliefs of their religious literature.
7. Unlawful seizure of religious literature and prevention of its use or circulation; a suppression of freedom of press.
8. Dissipation of not small sums, but over two million dollars of cash from the Lord's Purse, in the first year and a half of administration; no payment on any general creditor's claim; over a quarter of a million dollars for overhead of administration, attorney fees, etc. for the unprecedented persecution, in but the first year and a half of administration.
9. Application of substantive and procedural rights depending upon religious beliefs and willingness to dissassociate oneself from a religious society.



10. The misuse, abuse and perversion of the judicial arm of the Government.

We defy any person to show a record of violations of Freedom of Religion in any reported case to equal these.

The appellants are not without remedy. They ask the Court to cut the Gordian Knot—to set aside the adjudication in bankruptcy and to restore to them their Church and to protect them from further religious persecution.

### Conclusions.

1. A religious society under California law holds its property through a temporal agency, under a trust as though declared by deed, and not distinguishable from any other trusts known to equity.

2. A corporate temporal agency is subservient to and assists the religious society in temporal matters; holds property under a trust for the benefit of the religious society and those in it.

3. Trustees in bankruptcy do not take property held by a bankrupt under a trust, nor have any right to possession of it.

4. A corporate temporal agency cannot transfer \$2,600,000 of trust assets for \$111,000 debts.

5. A corporate temporal agency cannot dispose of about \$2,500,000 of assets over the debts, by a decree of forfeiture.

6. A corporate temporal agency cannot do such acts certainly without the consent of the religious

society or those in it, if it could remove property from the religious trust to other uses.

7. A California corporation that is solvent cannot transfer all of its assets, by conveyance or decree of forfeiture, without the written consent of its stockholders, and if a membership corporation without the written consent of its members.

8. By the very nature of a religious society, and freedom of religion, it cannot be adjudicated a bankrupt.

9. If a church could be adjudicated a bankrupt, the Court can act sua sponte, of its own motion, to prevent misuse of its temple, particularly a religious persecution.

10. The strongest possible religious persecution has been shown which the Court can prevent. It cannot sit idly by when such an outrageous conduct has come to its attention in this religious persecution. The persecuted humbly plead for the Court's protection, and the Court is not powerless.

11. The judicial power of the United States cannot be used to transcend the highest of the personal liberties—religious freedom—guaranteed by the Constitutional Bill of Rights, and we trust this Court will not tolerate the judicial power to be so perverted, misused and abused.

We ask the Circuit Court of Appeals for the protection of the highest of civil rights, a cornerstone of personal liberty—Religious Liberty. We ask the Circuit Court of Appeals for the applica-

tion of the United States Constitution, First Amendment to save the appellants' Church from the treatment of liquidation, administration, and disbursement by the Bankruptcy Court, and the appellants from the religious persecution shown in this record.

HOWARD B. CRITTENDEN, JR.

Attorney for Appellants Mr. and Mrs. Peter Petersen and George Patrick.















No. 11874

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United States

**Circuit Court of Appeals**

for the Ninth Circuit

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PETER PETERSEN, MRS. PETER PETERSEN and GEORGE PATRICK,

Appellees,

vs.

PAUL W. SAMPSELL, L. BOTELER and McINTYRE FARIES, as Trustees in Bankruptcy of the Estate of Christ's Church of the Golden Rule, bankrupt, and CHRIST'S CHURCH OF THE GOLDEN RULE, bankrupt,

Appellees.

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**Transcript of Record**  
**SUPPLEMENT**

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Upon Appeal from the District Court of the United States for the Southern District of California, Central Division





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Los Angeles 13, California. [1\*]

\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the  
Southern District of California, Central Division

No. 44128-WM

In the Matter of

CHRIST'S CHURCH OF THE GOLDEN  
RULE, a Non-Profit California Corporation,  
Debtor.

PETITION UNDER CHAPTER XI (SEC. 322)  
OF THE BANKRUPTCY ACT

To the Honorable Judges of the Above Entitled  
Court:

The verified petition of Christ's Church of The  
Golden Rule respectfully shows:

I.

That at all times herein mentioned, your petitioner is a non-profit corporation duly organized and existing under the laws of the State of California, as a private corporation under Title 12, Article 1 of the General Non-Profit Corporation Law of the State of California and for the greater portion of six months next immediately preceding the filing of this petition, has maintained its principal place of business and has had property and conducted its operations from and at 306 West Third Street, Los Angeles, California; that your petitioner is a corporation entitled to file a peti-

tion under Chapter XI of the Bankruptcy Act as amended.

## II.

That no bankruptcy proceeding has heretofore been filed by [2] your petitioner and no involuntary petition is now pending against it. That a State Court Receiver has been appointed upon application of the Attorney General for the State of California and is in possession of a portion of your petitioner's property; that said appointment has occurred within four months of the filing of this proceeding.

## III.

That your petitioner is not insolvent but is unable to pay its unsecured debts as they mature and desires to procure the benefits given under Chapter XI of the Bankruptcy Act as amended.

## IV.

That in accordance with the by-laws, rules, and regulations of said debtor church, when each of the members of the church became members thereof, they, and each of them, divested themselves of all worldly goods and possessions giving the same to the debtor church, and with the understanding that they would thereafter be classified as "Children of the Church", so long as they complied with its teachings, charter and by-laws, devoting their lives to its ministry. In the course of their training, they



are student ministers, work on, operate and manage the various church properties and enterprises which are intended to provide revenue for their particular type of Christian Crusade and ministry and are maintained and fully supported by the church during their membership therein. That said church is committed to maintain and fully support its members so long as they comply with its teachings, charter and by-laws.

V.

That your petitioner alleges, as required by Section 324, Article IV of Chapter XI:

(a) That your petitioner has certain executory contracts; copies of which are statements pertaining to the contents thereof and will be filed or made in connection with the schedules to be filed by your petitioner;

(b) That a statement of affairs of your petitioner will be [3] filed within the time directed by the above entitled Court;

(c) That the Clerk's filing fee will be paid on the filing of this petition;

(d) That your petitioner's assets are located in different Cities and Counties and a large part of your petitioner's books and records and information required to file schedules are in the hands of the Receiver in the State Court and in other localities and your petitioner is unable to file correct schedules of its assets and liabilities as required by

law and desires an extension of time from the above entitled Court within which to file said schedules.

That generally your petitioner's assets consist of office buildings, hotels, sanitariums, churches, ranches, laundries, as are briefly shown in Exhibit "A" attached hereto and made a part hereof; and your petitioner's liabilities are in general as shown in Exhibit "B" attached hereto and made a part hereof; that Exhibit "B" contains a list of your petitioner's unsecured creditors as correct and complete as your petitioner is at this time able to set them forth with the information and documents available to your petitioner.

#### VI.

That attached hereto and marked "Exhibit C" is an estimated budget of the monthly expenses required to operate and carry on the assets and commitments of your petitioner, including the maintenance and support of its members which is the sum of approximately \$66,500.00.

#### VII.

That your petitioner's financial position has become involved by reason of the appointment of the State Court Receiver in the action of certain creditors, both secured and unsecured in endeavoring to collect the amount of their obligation.

#### VIII.

That it is necessary for your petitioner to carry on its obligations, including the maintenance and

support of its members and the continuance of their training as student ministers of this church, [4] after the filing of this petition and to fulfill and discharge commitments and contractual obligations and to conserve and protect its property and to liquidate the same in the ordinary course of business in order to carry out the plan of arrangement hereinafter proposed.

## IX.

### Debtor's Proposed Plan of Arrangement

That your petitioner proposes the following plan of arrangement:

Article 1: That the creditors of your petitioner be divided into classes and that the proposed classes be as follows:

Class A: Expenses of administration that may be allowed and ordered paid;

Class B: All creditors entitled to priority as provided in Section 64a, subdivisions 2, 4, and 5, of the Acts of Congress relating to Bankruptcy;

Class C: Obligations as they mature to secured creditors in accordance with the terms of their encumbrance;

Class D: To pay pro-rata, at intervals not to exceed six months, dividends upon unsecured creditors' claims until said claims are paid in full.

Article 2: That said plan of arrangement be carried out in such a manner as not to interfere in

any way, with the religious teachings, and student ministry training, and living and working arrangements of the church members and their families. That in so doing a substantial saving will result from the operation of the properties herein mentioned.

Article 3: That the debtor be permitted to make payments from time to time when funds are available in accordance with this proposed plan of arrangement, and that it be given an extension of time within which to complete this arrangement and to discharge all [5] of the creditors' claims as provided and proposed in this arrangement.

Article 4: That a Receiver be appointed by the above entitled Court to take possession of all assets and to handle and disburse all receipts and to conduct and operate the affairs and business of the above named debtor under the supervision and orders of this Court with authority to employ agents, managers, and assistants as may be required to carry out the debtor's plan of arrangement.

Article 5: All debts incurred after the filing of this petition prior to a confirmation of the arrangement shall be paid in full and in such manner as ordered by the above entitled Court.

Article 6: The Court shall retain jurisdiction of the debtor's property and the operation of same until the payment in full of all creditors' claims,



or until the secured and unsecured creditors are by stipulation or otherwise satisfied.

Article 7: In the event any claim is in controversy in respect to classification or the amount due, the debtor, under order of Court, may make such deposit in such manner as the Court may direct in respect to said disputed claim and proceed to pay other creditors and be restored to possession pending a final determination of said disputed claim.

Article 8: That the debtor petitioner be permitted to photostat or make whatever copies that they may desire of any and all records which may be necessary to submit to the Court or the Receiver, and wherever possible, to substitute photostatic copies for originals for the Receiver's use, prior to delivery of said records to receiver.

## X.

That your petitioner is advised that Chapter XI of the Bankruptcy Act is the appropriate section of the Act under which to seek relief, and that your petitioner is not insolvent and that his business can be operated in such a manner, and that if permitted to continue its operations as proposed in this petition, your petitioner can pay all of its creditors in full. [6]

## XI.

That it is necessary for the speedy and proper administration of the debtor's affairs and the equitable payment of creditors, that all creditors and parties be enjoined from commencing or prosecut-

ing any suit or foreclosure proceeding in any form or manner other than before the above entitled Court.

Wherefore, your petitioner prays that proceedings be had upon this petition in accordance with the provisions of Chapter XI of the Acts of Congress relating to Bankruptcy, and that all creditors and all other parties be enjoined from commencing or prosecuting any suit in any Court or conducting any sale or foreclosure proceedings affecting the property of the debtor, or repossessing any property, except before the above entitled Court.

That the above entitled Court appoint a Receiver to take charge of the debtor's assets and with full authority to operate and carry on the debtor's business affairs, pending a confirmation of the debtor's proposed arrangement and that an adjudication be stayed, and that your petitioner be granted such other and further relief as is just and proper in the premises.

CHRIST'S CHURCH OF THE GOLDEN  
RULE,

By A. E. Knapp,  
Secretary Treasurer,  
Petitioner.

RUSSELL E. PARSONS,  
COBB & UTLEY,

Attorneys for Petitioner.

By Ernest R. Utley [7]

[Verified]. [8]

Resolved that in the judgment of the Board of Directors it is desirable and for the best interests of this corporation, its creditors, members and other interested parties, that a petition be filed by this corporation praying that it be given relief under and pursuant to Chapter XI of the Bankruptcy Act as amended, and

It Is Further Resolved that the Secretary and Treasurer of this corporation be and she is hereby authorized and directed on behalf and in the name of this corporation to file the necessary petition and schedules and statement of affairs and any and all other papers that may be deemed necessary and proper in connection with said proceeding, and

Be It Further Resolved that said corporation employ Cobb & Utley and Russell E. Parsons as its attorneys in connection with said bankruptcy proceeding, the fees of said attorneys to be paid pursuant to petition and order of Court as provided by law.

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I hereby certify that the foregoing is a full, true and correct copy of a resolution adopted by the Board of Directors of said corporation at a duly and regularly called and held meeting of said Directors held on the 1st day of November, 1945, at which all of the Directors of said corporation were present and voted; that said resolution appears on

the minutes of said meeting and that it has never been revoked or modified.

A. E. KNAPP,

Secretary and Treasurer of Christ's Church of the Golden Rule, a religious non-profit California corporation. [9]

EXHIBIT "A"

Property Statement

Date of Purchase	County	Address	Purchase Price Value	Unpaid Bal. of Principal as of Financial Statement of 12-31-44
1- 1-44	San Bernardino	Cannery, Redlands California	55,000.00	51,000.00
9- 1-43	Imperial	Ranch, Brawley California	32,000.00	29,660.00
1- 1-44	Imperial	Furniture, 527 "D" St. Brawley, Calif.	949.75	
4-13-44	Imperial	Ranch, A G. Jones, Imperial Co., Calif.	60,000.00	33,979.48
3- 1-44	San Bernardino	Dairy Ranch, Meadow Sweet Farms, Claremont, Calif.	127,260.75	110,978.59
11- 8-43	Imperial	Ranch, Geo. Jones Imperial Co., Calif.	25,000.00	
4-26-44	Imperial	Ranch, Brawley, Calif.	32,000.00	5,967.11
2-29-44	Imperial	5 Vacant Lots Brawley, Calif.	2,000.00	
2-18-44	San Bernardino	2 Lots & House, Redlands, Calif.	2,500.00	500.00
1- 1-44	Imperial	Lot , Brawley, Calif.	6,000.00	3,088.54
5- 1-44	Imperial	Ranch, Russo Bros., Imperial Co., Calif.	168,000.00	143,056.61
12-16-43	Imperial	Ranch, Brawley, Calif.	45,000.00	21,522.00
3- 1-44	Imperial	Lots, Brawley, Cal.	5,450.00	540.00



## Exhibit "A"—Property Statement—(Cont.)

Date of Purchase	County	Address	Purchase Price Value	Unpaid Bal. of Principal as of Financial Statement of 12-31-44
2-10-44	Los Angeles	Office Bldg., 406 S. Spring St., Los Angeles, Calif.	340,000.00	212,569.00
43	Los Angeles	Bank Bldg., 163 Marine St., Ocean Park, Calif.	25,000.00	18,327.00
43	Los Angeles	Beach Club, 1351 Ocean Front, Santa Monica, Calif.	32,000.00	30,000.00
8-20-41	Los Angeles	Hotel, 626 Azusa Av., Azusa, Calif.	15,250.00	8,700 00
9-28-43	Los Angeles	Beach Club, 808 Ocean Front, Santa Monica, Calif.	90,000.00	70,000.00
3-31-44	Los Angeles	Residences, 751-763 S. Coronado, Los Angeles, Calif.	20,000.00	16,150.00
10-30-43	Los Angeles	Furniture & Fix. 808 Ocean Front Santa Monica, Cal.	1,500.00	
2-11-44	Los Angeles	Apts. & Stores Main & Marine St., Ocean Park, Calif.	13,500.00	9,219.02
2-10-44	Los Angeles	Equipment, 216 Marine St., Ocean Park, Calif.	3,750.00	2,787.27
12-22-43	San Bernardino	Hotel, Casa Blanca, Ontario, Calif.		
12- 7-43	Los Angeles	Office Bldg., 845 s. Figueroa St., Los Angeles, Calif.	200,000.00	158,319.61
8-28-43	Los Angeles	Residences, 8433 Harold Way, Los Angeles, Calif.	25,000.00	
10-14-43	Los Angeles	2-Story Store Bldg. 333-337½ S. Hill St. Los Angeles, Calif.	35,000.00	27,107.00
1-28-44	Los Angeles	Residences, 745 S. Coronado, Los Angeles, Calif.	6,000.00	2,679.85
12-15-43	Los Angeles	Beach Club, S.M. Athletic Club, 1441 Ocean Front, Santa Monica, Calif.	45,000.00	36,534.49

Date of Purchase	County	Address	Purchase Price Value	Unpaid Bal. of Principal as of Financial Statement of 12-31-44
9-24-43	San Mateo	Creamery, 3072 Bayshore	8,100.00	800.00
Aug. 1943		Dairy on Oakland San Jose Highway	89,500.00	56,000.00
Oct. 43		American Laundry 585 E. Empire St., San Jose, Calif.	37,500.00	
Dec. 1943		Residence, 68 S. 10th St., San Jose, Calif.	4,500.00	1,225.00
Jan. 1944		Warehouse, 70 Mary St., San Francisco, Cal.	9,350.00	4,044.97
Jan. 1944		Residence, 67 S. 5th St., San Jose	11,500.00	4,208.00
Feb. 1944		Ranch, Colma, Cal.	57,500.00	
Feb. 1944		Parking Lot, Next to 425 Mason St., San Francisco	115,000.00	82,139.66
Mar. 1944		830 Folsom St., San Francisco	13,000.00	10,746.79
Jan. 1944		Denman Garage 902 Bush St., S. F.	22,500.00	9,307.37
Feb. 1944		Redwood Sawmill Willitts, Calif.	50,000.00	34,073.14
		Paradise Meadows Dairy & Stock Ranch	250,000.00	240,000.00
		Eagle Point, Ore.		
		Galbreath Auto Ct. Jackson Co., Ore.	13,500.00	11,000.00
		Grants Pass Hotel	35,000.00	31,000.00
		Hillcrest Bulb Gardens, Grants Pass Josephine Co., Ore.	250,000.00	220,000.00
		Ladino Cheese Factory, Jackson Co., Oregon	6,000.00	5,000.00
		Fish Hatchery, Jackson Co., Ore.	10,000.00	9,000.00
		Approximately 60 head purebred dairy Cattle	60,000.00	20,000.00
		Automotive and farming equipment	100,000.00	
		Growing Crops	100,000.00	
		Approximately 100 cars and trucks	300,000.00	
			2,956,110.50	1,731,230.50

## EXHIBIT "B"

Unsecured Creditors of Christ's Church of  
The Golden Rule as of 10-31-45

(Estimated as closely as possible from figures available  
at this time)

Name	Address	Approx. Amount
Nellie O. Paget, Insurance premiums	3153 Middlefield Road Redwood City, Calif.	400.00
Utilities and miscellaneous accounts payable	Secure from Project Records	15,000.00
O. R. Sharp	Westmorland, Imperial Co. California	1,500.00
Faure Co.	El Centro, Calif.	150.00
Gulletts, Grocery,	Brawley, Imperial Co., Calif.	300.00
Phillip Jones (Water Pump)	El Centro, Calif.	300.00
Miscellaneous Doctor Bills	Imperial Valley Farms Co.	200.00
Nordahl Co., Alfalfa Seeds	Unknown	3,000.00
Max Phaegley Brawley Implement Co.	Brawley, Calif.	1,200.00
Imperial Auto Electric Co.	Brawley, Calif.	100.00
Misc. current bills	Co-Workers Imperial Valley	500.00
N. L. Nagler	Hotel Medford, Medford, Ore.	5,000.00
Estate of Robert Nelson	Brawley, Calif.	10,000.00
George Gore	Kearny st. San Francisco	6,000.00
A. L. Wirin, Attorney	257 S. Spring St., Suite 501 Los Angeles	2,500.00
Lorrin Andrews, Attorney	326 W. 3rd St., Los Angeles	2,500.00
Russel E. Parsons, Atty.	306 W. 3rd St., Los Angeles	5,000.00
Richard B. Bell, Services Rendered	130 Montgomery St., San Francisco	1,000.00
Frank Rusalem	Hotel Cecil, San Francisco	10,000.00
Ruby V. Chapman	1201 California St., San Francisco	300,000.00
		364,650.00

## EXHIBIT "C"

Estimated monthly budget to operate entire property \$66,500.00

[Endorsed]: Filed Nov. 1, 1945. [15]

[Title of District Court and Cause]

**VOLUNTARY PETITION IN BANKRUPTCY**

To the Honorable Judges of the District Court of  
the United States for the Southern District of  
California, Central Division:

The petition of Christ's Church of the Golden Rule, a non-profit California corporation, of 306 West Third Street, in the City of Los Angeles, County of Los Angeles, State of California, engaged in the business of promulgating its interpretation of Christ Jesus' teachings and their practical application to human relationships, particularly His economic teachings and the evidence and proof that their sincere application would uproot the causes of poverty, crime and war . . . in other words, a demonstration of Christly actions as well as words, respectfully represents:

1. That your petitioner is a corporation organized and existing under the laws of the State of California, and is not a municipal, railroad, insurance or banking corporation, or a building and loan association.

2. That your petitioner has had its principal place of business at 306 West Third Street, Los Angeles, California, in the above [16] judicial district, for more than six months immediately preceding the filing of this petition, and has maintained and operated a place of business at said address for more than six months immediately preceding the filing of this petition.



3. Your petitioner owes debts and is willing to surrender all its property for the benefit of its creditors, except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy.

4. The schedule hereto annexed, marked Schedule A, and verified by your petitioners oath, contains a statement of its debts, (estimated as accurately as possible), and, so far as it is possible to ascertain, the names and places of residence of its creditors, and such further statements concerning said debts as are required by the provisions of said Act.

5. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains the estimated value of property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore your petitioner prays that it may be adjudged by the court to be a bankrupt within the purview of said Act.

CHRIST'S CHURCH OF THE GOLDEN  
RULE, a non-profit California corporation

By A. E. Knapp, Secretary  
Petitioner

A. L. Bell, Pres., Trustee, Dir.

[Verified.] [17]

[Endorsed]: Filed Nov. 15, 1945. [18]

United States District Court, Southern District of  
California

ORDERS OF ADJUDICATION AND OF  
GENERAL REFERENCE

At Los Angeles, in said District, on November  
19, 1945,

The respective petitions of each of the petitioners in the proceedings hereinafter mentioned, filed on the respective dates hereinafter indicated, that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and

It having been adjudged that each of said petitioners is a bankrupt under the Act of Congress relating to bankruptcy; and

It is thereupon ordered that the said proceedings be, and they hereby are, referred generally to the referees in bankruptcy of this Court, whose names appear opposite the respective proceedings hereinafter mentioned, to take such further proceedings therein as are required and permitted by said Act, and that each of the said bankrupts shall henceforth attend before said referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

Number 44-128-WM Title of Proceedings  
Christ's Church of The Golden Rule, a corpora-

tion Filed 11-15-45 Referee Benno M. Brink,  
Esq., Los Angeles, Calif.

WM. C. MATHES,  
United States District Judge.

[Endorsed]: Filed Nov. 19, 1945. [19]

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November 9, 1945.

### CERTIFIED COPY OF RESOLUTION

Adopted by the Board of Directors of Christ's  
Church of the Golden Rule, a Religious, Non-  
Profit, California Corporation.

Resolved that, in the judgement of the Board of  
Directors, it is desirable and for the best interests  
of this corporation, its creditors, its members, and  
other interested parties, that a voluntary petition  
be filed for and on behalf of said corporation, or  
that a consent and request that said corporation be  
adjudicated in the Chapter XI proceedings now  
pending in the United States District Court for the  
Southern District of California, Central Division,  
or both, for and on behalf of said corporation, and

It Is Further Resolved that the President or the  
Secretary-Treasurer, of this corporation, or either  
of them, be and they are hereby authorized and di-  
rected on behalf and in the name of this corpora-  
tion, to file a voluntary petition in bankruptcy for  
and on behalf of the corporation and schedules and

statement of affairs and such other necessary petitions and documents as may, from time to time, be necessary, and/or to consent to and request an adjudication in bankruptcy in that certain proceeding heretofore filed in the United States District Court of the Southern District of California, Central Division, which was filed by this corporation under and pursuant to Section 322 of Chapter XI of the Bankruptcy Act, as amended, or both said proceedings.

It Is Further Resolved that the nature of the proceeding, or proceedings and the time and place of filing shall be left to the discretion of Cobb & Utley and Russell E. Parsons, its attorneys.

The above resolutions are to be effective only in the event that they are carried into execution during the month of November, 1945. Otherwise they are to be of no force and effect.

I hereby certify that the foregoing is a full, true and correct copy of a resolution adopted by the Board of Directors of said corporation at a duly and regularly called and held meeting of said Directors held on the 9th day of November, 1945, at which all of the directors of said corporation were present and voted; that said resolution appears on the minutes of said meeting and that it has never been revoked or modified.

I also certify that the foregoing resolution was



fully approved by A. L. Bell, Sole Trustee of Christ's Church of the Golden Rule.

In Witness Whereof, I have hereunto set my hand and the seal of the Corporation, this 9th day of November, A.D. 1945.

/s/ A. L. BELL,  
Pres. Trustee  
Director.

/s/ A. E. KNAPP,  
Secretary and Treasurer of Christ's Church of the Golden Rule, a religious, non-profit, California Corporation.

/s/ A. P. NORDSKOTT,  
V. P. & Dir. [72]

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[Title of District Court and Cause.]

ORDER ON PETITION FOR DISMISSAL  
AND ORDER OF ADJUDICATION

The above named Debtor having filed a petition for an arrangement under Section 322, Chapter XI, of the Bankruptcy Act, as amended, and the People of the State of California, through the Attorney General of the State, having filed a petition for an order dismissing the proceedings; and an order to show cause having issued thereon requiring the Debtor and all creditors and other parties in interest to show cause why the prayer of the petition of the People of the State of California should not be granted; and notice having been given to the Debtor, creditors and others as provided in said order to show cause; and the matter having come

on for hearing on November 13, 1945, at the hour of 10 o'clock A.M., before Honorable William C. Mathes, Judge of the above entitled Court, and Russell E. Parsons and Cobb & Utley appearing on behalf of the Debtor, [73] and the petitioner for the order of dismissal being represented by Robert W. Kenny, Attorney General for the State of California, by Warren Olney III, Special Assistant to the Attorney General, and Clarence A. Linn, Deputy Attorney General, and Allen T. Lynch, appearing as Assistant Counsel, and Raphael Dechter and Harry A. Pines appearing on behalf of certain creditors, namely Richard B. Bell of San Francisco, California, N. L. Nagler of Medford, Oregon, and the Estate of Robert Nelson deceased, of Brawley, California, and Carlos S. Hardy appearing for Homesteaders Life Association, a secured creditor; and evidence, both oral and documentary, having been offered and received, and the Debtor having thereupon filed its verified "Request for and Consent to Adjudication" withdrawing the plan of arrangement offered in its original "Petition under Chapter XI (Sec. 322) of the Bankruptcy Act" and voluntarily consenting and requesting that the Debtor be immediately adjudicated a bankrupt, and praying that said plan of arrangement be abandoned and that the Debtor be adjudicated a voluntary bankrupt in accordance with the provisions of the Bankruptcy Act as amended; and the debtor also having then filed its voluntary petition in bankruptcy; and all parties

appearing having stipulated that the petition for an order of dismissal theretofore filed by the People of the State of California should apply with equal force to the Debtor's "Request for and Consent to Adjudication" and to the Debtor's voluntary petition in bankruptcy then on file, and that all evidence theretofore offered and received by the Court in the proceedings should apply with equal force to all pending petitions; and the matter having been argued and submitted and findings of fact and conclusions of law having been waived by all parties, the Court having announced its decision and directed [74] preparation of a written order, now makes the following order:

It Is Hereby Ordered that the motion of the Debtor to refer to a Referee the proceedings under the petition filed November 1, 1945, pursuant to Section 322, Chapter X, of the Bankruptcy Act as amended, be and said motion is hereby denied; and that the Debtor's petition for an injunction filed November 5, 1945, be and said petition is hereby denied, without prejudice to the filing of a later application if so advised; and

It Is Further Ordered, that the order to show cause issued November 7, 1945, on the petition of the People of the State of California for an order dismissing the proceedings under Section 322, Chapter XI, of the Bankruptcy Act as amended, be and said order to show cause is hereby discharged; and that the petition of the People of the State of California be and said petition is hereby denied without prejudice; and



It Is Further Ordered, that the prayer of the Debtor's "Request for and Consent to Adjudication" filed November 15, 1945, be granted, and that the Debtor's petition for an arrangement under Section 322, Chapter XI, of the Bankruptcy Act as amended, be and said petition is hereby denied without prejudice to the right of the Debtor hereafter to file a further petition for an arrangement under Section 321, Chapter XI of the Bankruptcy Act, as amended, if so advised; and

It Is Further Ordered, that the petition of the People of the State of California, submitted as above stated upon oral stipulation of the parties in open Court for an order dismissing the Debtor's "Request for and Consent to Adjudication" and the Debtor's voluntary petition in [75] bankruptcy filed herein November 15, 1945, be and said petition is hereby denied; and

The Debtor having filed its "Request for and Consent to Adjudication" and its voluntary petition in bankruptcy, both praying that the Debtor be adjudicated a bankrupt under the Act of Congress relating to bankruptcy, and said "Request for and Consent to Adjudication" and said petition having been heard and considered, and the application of the People of the State of California for an order dismissing said "Request for and Consent to Adjudication" and said voluntary petition in bankruptcy having been denied;

It is adjudged that the Debtor, Christ's Church of The Golden Rule, a non-profit California cor-



poration, is a bankrupt under the Act of Congress relating to Bankruptcy.

Dated this 19 day of November, 1945.

WM. C. MATHES,

United States District Judge.

Findings of Fact and Conclusions of Law are hereby waived, and the foregoing Order is approved as to form pursuant to Rule 7, this 19th day of November, 1945.

By RUSSELL E. PARSONS and  
COBB & UTLEY

By ERNEST R. UTLEY

Attorneys for the Debtor  
(Bankrupt)

RAPHAEL DECHTER and  
HARRY A. PINES

By HARRY A. PINES

Attorneys for Richard B. Bell, L. N. Nagler, and  
the Estate of Robert Nelson, deceased. [76]

CARLOS S. HARDY,

Attorney for Homesteaders Life Association.

ROBERT W. KENNY,

Attorney General of the State of California.

WARREN OLNEY III

Special Assistant to the Attorney General.

CLARENCE A. LINN,

Deputy Attorney General

By ROBT. S. MORRIS, JR.,

Deputy Attorney General

[Endorsed]: Filed Nov. 19, 1945. [77]

United States District Court, Southern District  
of California

ORDERS OF ADJUDICATION AND  
OF GENERAL REFERENCE

At Los Angeles, in said District, on November 19, 1945, the respective petitions of each of the Petitioners in the proceedings hereinafter mentioned, filed on the respective dates hereinafter indicated, that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and

It having been adjudged that each of said Petitioners is a bankrupt under the Act of Congress relating to bankruptcy; and

It is thereupon ordered that the said proceedings be, and they hereby are, referred generally to the referees in bankruptcy of this Court, whose names appear opposite the respective proceedings hereinafter mentioned, to take such further proceedings therein as are required and permitted by said Act, and that each of the said bankrupts shall henceforth attend before said referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

Number: 44,128-WM. Title of Proceedings.  
Filed. Referee. Christ's Church of the Golden

Rule, a corporation. 11-15-45. Benno M. Brink, Esq., Los Angeles, Calif.

WM. C. MATHES,

United States District Judge

[Endorsed]: Filed Nov. 19, 1945. [78]

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[Title of District Court and Cause.]

NOTICE OF MOTION TO SET ASIDE  
ADJUDICATION

To the trustees in bankruptcy of the above entitled estate and to Grainger & Hunt, Esq., their attorneys:

Will you and each of you please take notice that George Patrick, Mr. Peter Petersen and Mrs. Peter Petersen will at the hour of 10 AM on the 3rd day of November, 1947, or as soon thereafter as counsel can be heard, at the Courtrooms of the Honorable Judge Mathes, Judge of the above-entitled Court in the Federal Building, Temple and Spring Streets, Los Angeles, California move the said Honorable Court for its order setting aside the adjudication in bankruptcy in the above-entitled matter.

Said motion will be made upon the grounds that the bankrupt was at all times and until said adjudication was the temporal agency for the eccles-

iastical organization and religious society of Christ's Church of The Golden Rule, and held all its property under a religious trust for said ecclesiastical and religious society; that the said corporate temporal agency was not a proper subject by itself to be adjudicated a bankrupt; that there was no proper authority or consent for the filing of the voluntary petition for adjudication in bankruptcy, either by the directors of the said corporate temporal agency, or by the ecclesiastical [328] church government, or by any membership; that the consent to the voluntary petition for adjudication by the corporation president was obtained by his misunderstanding of the nature and character of the proceedings and the adjudication prayed; and that the adjudication has been and now is being used as a means and instrument of religious persecution in violation of the Freedom of Religion, First Amendment, United States Constitution, in the following particulars:

a) Until September 30, 1946, the three trustees originally appointed, two professional bankruptcy liquidators and a brewer, none of whom subscribed to the religious teachings of the Church collected all the income and other donations and disbursed and ran all the activities of the religious society including its religious seminary and religious publications;

b) The Trustees in Bankruptcy and the Referee have conducted the affairs of the religious society, and supervised and directed them;



c) The Trustees in Bankruptcy have carried on over a period of months a campaign of entering the private living quarters of the various religious believers and seized without process their personal papers, and impounded all religious writings under keepers, to prevent their use or circulation;

d) The administration has been conducted by a rule of administration known as the "White Case" wherein certain teachings and religious beliefs of the religious society have been condemned as heresy (fraud) for failure to make judicial proof of the truth of such beliefs; and the said "White Case" has been applied so that all who will promptly leave the Church, renounce its teachings under oath as fraudulent and false and its religious leaders as knaves and cheats, will have the return of all property they gave, all property they claim, and compensation for their time spent in the religious work, including compensation for religious instruction; that those who remain "loyal" to their religious [328] beliefs common to those in the religious society are to be brought before the Bankruptcy Court on summary proceedings, stripped of their property by such summary proceedings; that those who will become "Dissenters" amounting to about 5% of the society will be granted enormous claims totalling about \$300,000, which is payable in preference to the claims, rights or status of those remaining "loyal" to said beliefs;

e) That by a policy openly practiced by said bankruptcy administration, said heresy trial

(White Case) is used as a means of religious persecution and discrimination in its application to all those in the above-entitled estate depending upon the classification of religious beliefs "loyal" or "dissenters" for the application of the matters set forth in d) above.

f) That 21a examinations have been used as a means of inquisition and religious persecution in the said administration, and numerous and extensive administration examinations have been conducted as an inquisition against and involving all who remain "loyal" and as a means of determining the religious beliefs of persons suspected of assisting the persons in such religious society.

g) That paid employees, from the religious society's funds held under said religious trust, have been used to harass and annoy those remaining with the religious society and as a means of inducing the individuals to withdraw from said church religious society.

That said motion will be made upon the record, papers and proceedings on file, upon the transcripts and briefs filed in the Patrick and Petersen Reviews, and upon evidence to be introduced at the hearing of said motion.

24 October, 1947.

/s/ HOWARD B. CRITTENDEN, JR.  
Attorney for George Patrick, Mr. & Mrs. Peter Petersen.

(Acknowledgment by mail attached.)

[Endorsed]: Filed Oct. 27, 1947.]

[Title of District Court and Cause.]

ANSWER OF TRUSTEES IN BANKRUPTCY  
TO MOTION TO SET ASIDE  
ADJUDICATION

Now comes Paul W. Sampsell, L. Boteler and McIntyre Faries, the Trustees in Bankruptcy of the Estate of the above named corporation, and for answer to the motion filed by George Patrick, Peter Petersen and Mrs. Peter Petersen to set aside the adjudication in bankruptcy herein made and entered on November 19, 1945, allege and deny as follows:

I.

The statement of facts alleged in said motion is not supported by any affidavit or evidence of any kind, or by any verification, nor by the record of the proceedings in the case in the above entitled court, or in the ancillary bankruptcy courts involved in the above entitled proceeding, viz., the United States District Court for the Southern Division of the Northern District of California and the United States District Court for Oregon.

II.

The said motion fails to state a claim upon which relief can be granted. [330]

III.

None of the proponents of the said motion are parties in interest in connection with any such motion in that none of them are creditors of the estate. The bankrupt corporation does not have any stockholders. It is a religious non-profit corp-

oration organized and existing under California laws.

#### IV.

The proponents of the said motion are guilty of latches in filing and prosecuting such motion in this: Each of the said proponents has been well aware of the pendency of the bankruptcy case since its inception on November 1, 1945. Since that time, in the course of the administration of the estate, over two million dollars have been received and disbursed by officers of the bankruptcy court, including primary and ancillary receivers and trustees; over 30 sales of real and personal property, principally real property, have been consummated under the supervision of the court of bankruptcy, primary and ancillary; about 27 petitions in reclamation of real and personal property from the possession of such officers have been filed and either determined or are pending; and some reconveyances of real and personal property have been made to the original owners by such officers under the supervision of the bankruptcy court. A vacation of the adjudication would cause inextricable confusion with respect to the titles to such real property and serious financial loss to the purchasers thereof from the bankrupt estate and those to whom such reconveyances were made, all of such persons being innocent parties herein. Furthermore, several millions of dollars of claims against the estate have been filed against the estate by alleged creditors thereof, secured, priority and gen-



eral, some of which have been allowed and some disallowed. (See *Mason v Dean*, CCA, 9, 31F (2) 945, 13 ABR, NS, 771; *Hudebeck v Sanderson*, CCA, 9, 36 ABR 146, 227 F 575; in re [331] *Illinois Fireworks*, D. C., Ill., 22 ABR, NS, 690, 4F, Supp. 200; in re *Farrell*, DC, Pa., 6 ABR, NS 731, 10 F, (2) 612; *Alexander v Farmers* CCA, 5, 47 ABR, 302, 275 F 824; *Dodge v. Kenwood*, AAA, 8, 204 F 577, 29 ABR 586; affm'g in re *Kenwood*, 189 F, 525, 26 ABR 499.

## V.

With respect to the allegations of fact set forth in the said motion, deny each and every allegation.

## VI.

No lack of jurisdiction of the above entitled court to make the adjudication in bankruptcy herein appears upon the face of the record of this case. Furthermore, most of the allegations of fact set forth in the said motion relate solely to occurrences after the adjudication was made and were not in existence when the adjudication was made.

Wherefore, the said Trustees pray that the said motion be denied and that they be granted general relief, together with their costs.

Dated: November 3, 1947.

GRAINGER & HUNT,

By REUBEN G. HUNT,

Attorneys for Trustees.

(Verified.)

[Endorsed]: Nov. 12, 1947. [332]

[Title of Court and Cause]

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

Los Angeles, California

Friday, November 14, 1947

Before: Honorable William C. Mathes,  
Judge Presiding.

Appearances:

For Movants and

Petitioners: Howard B. Crittenden, Esq.

For Trustees: Reuben G. Hunt, Esq.

For the Bankrupt: Ernest R. Utley, Esq.

The Court: If all interested parties were here ready to proceed.

Mr. Crittenden: Yes, sir.

The Court: Is there objection, gentlemen, to hearing the petitions for review in the Patrick and Petersen matters along with the motion to vacate the adjudication?

Mr. Hunt: I am prepared to go ahead this morning, your Honor.

(Tr. page 3.)

The Court: And the bankrupt, the trustees, petitioners and moving parties are all present.

Mr. Crittenden: That is right, your Honor. I am taking up, first, the motion, your Honor.

Pursuant to a notice of motion which has been continued to this date, the petitioners, Peter Petersen and Mrs. Peter Petersen and George Patrick, in making the motion on the grounds set forth in my motion, which is in essence two separate grounds—one, to set aside the adjudication on the ground of jurisdiction, and the second ground, to set aside the adjudication on the ground of abuse and perversion of the adjudication or administration of the estate which has amounted to a religious persecution under the First Amendment to the United States Constitution.

The Court: I have read your motion and your brief. As to the second ground is there any basis upon which the court can entertain a motion to vacate an adjudication upon the claimed ground that the estate is not being administered properly?

Mr. Crittenden: Yes, your Honor. I filed a memorandum—I apologize that it was not here until this morning—covering that law and served a copy on opposing counsel.

The Court: I have read your memorandum.

Mr. Crittenden: You mean the one I filed this morning?

The Court: Yes, filed on November 14th.

(Tr. page 4.)

Mr. Crittenden: Yes. That is the *Zeitinger v. Hargadine-McKittrick Dry Goods Co.* case, Eight Circuit, 244 Fed. 719; and the *Smith v. Chase National Bank of the City of New York*, Eight Circuit, 84 Fed. 608.

The Court: Well, those were jurisdictional cases,

weren't they, cases that go to the very jurisdiction of the court to adjudicate?

Mr. Crittenden: Your Honor asked me a question. Now I am going to have to answer that. There are two classes of case—one where they have the power to adjudicate and have adjudicated, and the question of administration where the court is asked to carry out some wrongful act which is a misuse of the temple of justice.

As you will recall it—and I believe I can dig some of these cases out on factual grounds—that is directly discussed in the Ninth Circuit case of *McDonough v. Owl Drug Company*, in 75 Fed. (2d) 45; and *In Re Fox West Coast Theatres*, 88 Fed. (2d) 212. Both are Ninth Circuit decisions, and the language in them points out that an attack can be made on that ground, that it is intended to be misuse of the temple.

The Court: That the very filing of the petition itself was a part of the scheme.

Mr. Crittenden: No, no.

The Court: To defraud, and an imposition upon the bankruptcy court; isn't that it?

(Tr. page 5.)

Mr. Crittenden: Maybe I did not make this clear, your Honor. I see your point. If jurisdiction attaches by reason of the person and the subject matter before the court, of course, nothing that takes place after that can divest that jurisdiction.

The Court: No. That is true.

Mr. Crittenden: But they can in the administration so conduct the estate that it does effect



a fraud on the court, such as in the Fox West Coast Theatre case, where they said, "Yes; this is just holding a sale of these properties," or in the Owl Drug case, the Owl drug stores, where they held a sale of the properties. Afterwards, it was used as a fraudulent means or a misuse of the temples of the court.

If this court sees its judgment being used in violation of the First Amendment of the United States Constitution, it is not powerless to sit back and say, "I will permit my orders and my judgment to be misused." So far as that contravenes the United States Constitution that judgment is void, and the moment it is used for that purpose it is the duty upon this court at that moment to stop the administration.

The Court: But have you chosen the proper method here? Anything the referee does can be reviewed by this court; anything this court does can be reviewed by the United States Circuit Court of Appeals; and anything the United States Circuit Court of Appeals does can be reviewed by the Supreme Court of the United States.

(Tr. page 6.)

If the referee has made any improper order in this matter, it is open to review; if this court has made any improper order, it is open to review; if the trustees have abused their offices, isn't the remedy to remove the trustees?

Mr. Crittenden: Well, now, there are lots of ways of killing a cat besides feeding it cream until it dies of kindness; and the remedy of a review is

by no means adequate. A court of equity, which this court sits as, under these circumstances has jurisdiction to hear the substance and to prevent a wrong when it sees it about to take place. And when it sees a course of conduct which I am prepared to prove, I believe, under the circumstances, your Honor would protect this process of this honorable court from abuse and further abuse.

The Court: As I understand your contention from reading your memorandum, it is that two of the trustees have engaged in what you call "religious persecution".

Mr. Crittenden: Very much so; and there were three who did before Mr. Faries.

The Court: The remedy for that, if the trustees are abusing their office is to remove them, isn't it?

Mr. Crittenden: That is only one of them, one remedy.

The Court: It would not be the remedy to vacate the adjudication and upset transactions involving thousands of dollars.

(Tr. page 7.)

Mr. Crittenden: It does not upset any transaction that has taken place in the past. It is only prospective in its action. That which is an abuse of the court's process is not retroactive in its effect. It only stops future administration. That is the very language in the Ninth Circuit decision which I have cited here, that it is prospective in its effects.

The Court: Of course, you are referring to those cases where the bankruptcy proceeding was being used to perpetrate a fraud. The affected parties—

Mr. Crittenden: That is right; being used for improper purposes, which the court will not permit, nor will your Honor permit your process—

The Court: Those were cases where parties besides the trustees were involved. When you criticize the conduct of the trustees you are criticizing the conduct of officers of the court.

Mr. Crittenden: Exactly, and the court, therefore, should not permit that to be done.

The Court: Do you have any case in which the court has vacated adjudication because of an improper conduct of some of the officers of the court?

Mr. Crittenden: Well, that is what all of these are where they have set them aside, because the court holds the sale—

(Tr. page 8.)

The Court: It is the people who put the corporation into bankruptcy who are engaged in perpetrating the fraud in those cases. That is the claim, isn't it?

Mr. Crittenden: The fraud can arise after the adjudication is made and the court will do it.

The Court: Yes. But who are the parties attempting to impose upon the jurisdiction of the court? Are they parties who are officers of the court in any of those cases?

Mr. Crittenden: They have to be, because the court could not act except through its officers.

The Court: Give me the citation where because of misconduct of the trustees an adjudication has been set aside.

Mr. Crittenden: Well, I can go through all the



cases, if you would like me to do it, and take them up one by one.

The Court: That is like burning down the barn in order to roast a pig, isn't it? If the trustees are acting improperly, why should they not be removed and the administration go on?

Mr. Crittenden: The very nature—

The Court: I mean referring only to your second ground. I am not referring to the question of jurisdiction. I want to hear you on the question of jurisdiction. But is there any basis for hearing the second ground at all?

(Tr. page 9.)

Mr. Crittenden: Yes. And I will say this: That the very nature of the church and religious society is such that when its affairs are undertaken to be administered by the bankruptcy court—and your Honor knows as well as I do—you practiced law here a good number of years—in what repute the administration of bankruptcy stands. And they go out and they use a strong hand on that group and they say, "Come into the court and we will hold our hearings in here." And you know just how that is done. It is not at all moderate, nor are the 21-A examinations or inquisitions—

The Court: Just a moment, just a moment. You say that Trustee Faries is acting properly as a trustee. It is only the other two trustees who acted improperly?

Mr. Crittenden: He interceded on my behalf to stop some of this, and particularly the proceedings in San Francisco, and he was unsuccessful.



The Court: So on your second ground the claim is that two trustees are not acting properly; they are abusing their office; isn't that the claim?

Mr. Crittenden: May I put it this way: The administration, even with a man like Faries attempting to be the opposition, has been unsuccessful; and if a man like Faries is unsuccessful, certainly that is showing that this type of administration of the bankruptcy court when applied to the religious society just does not go together any more than gasoline and a match go together.

(Tr. page 10.)

The Court: Let me ask you this: If you had three trustees like Faries, you would feel you were all right, wouldn't you, or would you still think the adjudication should be set aside upon the second ground?

Mr. Crittenden: Well, I would even go this far, to say that the existence of the inquisition that is carried on under 21 A and the opportunities that are there presented for an inquisition, which, by the way, your Honor, is copied after the same Roman jurisprudence that the inquisition of the famous Spanish inquisition is copied from, and carried on in the same way, is used in the court. I speak with a little authority on this—

The Court: They do not use the rack down there, do they?

Mr. Crittenden: Well, I don't know. It looks like it and I could even view the tormentor.

Now, your Honor, could I point this out as to

the Roman type of jurisprudence? I sat, as your Honor does—

The Court: I am not going to hear you on that, because the head of this church and his wife sat on the witness stand in this court and not fewer than a dozen times claimed the privilege and stood on the privilege of refusing to testify, because the questions called for answers which might tend to incriminate or degrade them. That was their constitutional privilege and they stood on it.

(Tr. page 11.)

Mr. Crittenden: That is right.

The Court: Has there been any abuse of that before the referee?

Mr. Crittenden: He called these people in and asked them their religious beliefs at the present moment, and not less than two weeks ago.

The Court: Why did you not seek to review the order?

Mr. Crittenden: I can't do it until there is an order to review. We have to go through the inquisition. Mr. Hunt asked Mr. Petersen his present religious convictions as of the time he was sitting on the stand, before a referee in bankruptcy—certainly a religious inquisition if there ever were one, under 21J of the Bankruptcy Act.

Now, if you want to know a clearer case of religious inquisition, I would like to know what it is. If your Honor could bring people in and ask them their religious beliefs and apply the law, apply it according to the religious beliefs, I think all idea of religious freedom is gone.

The Court: Who is applying the law according to religious beliefs?

Mr. Crittenden: That is what our record shows. It is one of our grounds here.

The Court: Who is doing it?

(Tr. page 12.)

Mr. Crittenden: The referee.

The Court: All right. Why didn't you petition to review his order?

Mr. Crittenden: We did, but we have to go ahead with the inquisition. And, by the way, the costs of records are not cheap and it is a lot of work. And a lawyer who has an active practice, to prepare and travel and do all of this along with it, it is a tremendous load, not upon one counsel, but several counsel.

The Court: That is the first time I ever heard the indisposition or the business of the lawyers as a ground for vacating an adjudication in bankruptcy.

Mr. Crittenden: I daresay that if you use it as a rack or have your tormentor there to inquire of this man and put him through the inquisitorial method of the Roman law, certainly the man has no remedy until he reviews it, for damages done. The man who has been on the rack has no remedy to come and say, now that it is over, I want to be told that I didn't have a right to go through that.

The Court: Oh, no. He has a better remedy than that. If the question is manifestly improper, violates his constitutional rights, why, he may stand upon those and refuse to answer.

Mr. Crittenden: Let us take another question just to show you what has happened. The trustees hired two or three private detectives; they go through the personal and private papers of every individual of a certain religious belief, those who are loyal to this society, ransack them, then they take them, and so they bring them in.

(Tr. page 13.)

The Court: Just a moment. There is one of the great troubles of this whole case, the loose language, this thing of calling certain people "loyalists" and certain people "dissenters".

Mr. Crittenden: I agree with your Honor.

The Court: It is puerile, from my point of view. The people who are dissenters are the people who sought to rescind their transaction whereby they gave this property to the church; isn't that correct?

Mr. Crittenden: May I say this?

The Court: Is that correct?

Mr. Crittenden: Those who have denounced their religious beliefs and their religious leaders.

The Court: All right. Are there any dissenters who denounced their religious beliefs who are trying to get their property back?

Mr. Crittenden: I haven't heard of a one of them.

The Court: No. So it is just mixing up a lot of religious belief with property rights, and here we are concerned with property rights.

Mr. Crittenden: We are concerned here, your Honor, with the constitutional right of a man to



freedom of religion, and we will be as long as that First Amendment is in the Constitution.

(Tr. page 14.)

The Court: That is a nice speech, but what does that have to do with this bankruptcy?

Mr. Crittenden: That is why you are hearing the matter here at this very time. I want to show that these trustees put in a —

The Court: You make a motion to remove the trustees if you want to.

Mr. Crittenden: I will amend it to include that, your Honor.

The Court: I am not going to hear that this morning. I will hear you on the question of jurisdiction. But as far as the second ground is concerned, to my mind it is not a basis to remove the trustees.

Mr. Crittenden: May I say this, your Honor?

The Court: No affidavits here in support of it.

Mr. Crittenden: I understand the motion is to be made by proving these facts, and we will ascertain the facts and show —

The Court: All right; you make an offer of proof and I will rule on it.

Mr. Crittenden: All right.

The Court: This is on your second ground.

(Tr. page 15.)

Mr. Crittenden: This is on my second ground.

I want to prove that on August 19 of 1946, the trustees by paid detectives went to the Homesteaders Building; they seized and went through the personal effects of the parties and took their per-

sonal and religious literature and papers, and took them and seized them and impounded them.

That they went to Oregon and they seized some papers up there by searching the places. They did the same thing in other places and took them and moved them to Los Angeles. Subsequently they were demanded and returned. The seizure took place.

There was no process except a subpoena duces tecum issued by this court, without an affidavit, commanding the trustees to produce certain papers for a hearing which was never held.

I also want to show on this proof that the trustees hired third parties at wages as full timekeepers, who sat in the Homesteaders Building and who took all of the religious literature and refused to release any part of it, and as far as any current stuff—this is after bankruptcy—that was up until Christmastime of 1946, held this religious literature, even to the publications coming out and even as to current legal papers which these parties had to protect their rights, were seized and held by the trustees in bankruptcy.

(Tr. page 16.)

The Court: What was the literature doing in the Homesteaders Building?

Mr. Crittenden: They lived there.

The Court: What were the people doing in the Homesteaders Building?

Mr. Crittenden: Carrying on religious work.

The Court: Were they paying rent?

Mr. Crittenden: Yes.

The Court: Rent?

Mr. Crittenden: Yes.

The Court: What—money rent?

Mr. Crittenden: Yes.

The Court: To whom?

Mr. Crittenden: The trustees.

The Court: Do you make that as a representation?

Mr. Crittenden: I understand that there was money paid.

The Court: Do you know it to be a fact? I ask you a question as a fact.

Mr. Crittenden: Now, let me get it. I understand they were paying power, light and upkeep.

The Court: They are living there rent free, aren't they?

Mr. Crittenden: No.

The Court: Other than that?

Mr. Crittenden: No. I think, under the decisions cited here, that the beneficial enjoyment—

(Tr. page 17.)

The Court: I am asking you are they paying any money rent?

Mr. Crittenden: Well, not to the trustees in bankruptcy, as rent; no.

The Court: Are they paying anything to the trustees in bankruptcy?

Mr. Crittenden: They are paying the lights and they are paying—I can't make a representation as to how much more besides utility bills and the upkeep of the premises.

Now, I am going to that point, your Honor.

The Court: All right; proceed with your offer.

Mr. Crittenden: All right. That the trustees in bankruptcy put these keepers in there, took the religious literature and held it and kept it from being distributed; and that they put a keeper at the seminary in San Francisco and there kept literature from going out and being circulated.

As to the next point, I have my witnesses here to prove that there have been almost daily, at least for the first year and a half, inquisitions under 21A and 21J, and even some up to the present time, being carried on in the bankruptcy court; and it is almost entirely those who are loyal members who are subjected to that.

The Court: By "loyal members" you mean people who filed claims?

Mr. Crittenden: No.

(Tr. page 18.)

The Court: That they have not rescinded their transactions or attempted to?

Mr. Crittenden: No, those who have religious beliefs in the society.

The Court: Let me ask you this: Are there any loyal members, so-called, who have not attempted to rescind their transactions with the church?

Mr. Crittenden: I think everyone has attempted to rescind their transactions exactly on the same grounds as the others.

The Court: Those are the dissenters, aren't they?

Mr. Crittenden: No; the loyalists.

The Court: In other words, they are so-called



loyal members who have attempted to rescind their transactions with the church?

Mr. Crittenden: Yes. Yes, so far as I know, everyone has.

The Court: And get back their property?

Mr. Crittenden: What?

The Court: And get back their property?

Mr. Crittenden: Yes.

The Court: What is the difference between this proceeding of the so-called loyalists and the so-called dissenters?

Mr. Crittenden: Religious beliefs, your Honor.  
(Tr. page 19.)

The Court: Well, I don't want to hear any more of it, then, if that is the only difference between the two groups. I don't want anyone else to mention those groups in this court even.

Mr. Crittenden: Insofar as that goes—

The Court: I said I do not want to hear it. You understand me.

Mr. Crittenden: —I am going to plead the constitutional rights of my clients in this court. If I do not, I will do it in the higher court.

The Court: You do it here if your wish, but I do not want any distinction.

Mr. Crittenden: It is used on the religious basis. I want to show it is used as religious discrimination.

The Court: That is no distinction.

Mr. Crittenden: If it is followed and applied, it is certainly entitled to redress in this court; if not in this, in the Ninth Circuit; and if not in the

Ninth Circuit, in the Supreme Court of the United States.

The Court: I want to show that these proceedings by 21 A and 21J has been almost exclusively to those who held the religious beliefs of the society, and those who had denounced it were the ones who were not brought in. A distinction was made in the application of these remedies by religious beliefs.

(Tr. page 20.)

Secondly, I want to show—

The Court: Who brought them in, the trustees?

Mr. Crittenden: Yes. I also want to show that these summary proceedings in line with this religious persecution, religious distinction and religious beliefs were applied to those of certain religious beliefs and not applied to those in the same factual situation because they had denounced their religious beliefs.

And I will show, your Honor, as I proceed here, the very statements of counsel that are based solely upon religious beliefs that these remedies are applied.

It is very unusual to have as strong a case as that.

I also want to show—

The Court: You propose to show that the only difference between these two so-called groups is wholly religious beliefs; that there is no difference in their relationships to the property of the church at all?

Mr. Crittenden: Your honor, it is extremely difficult in an offer of proof—

The Court: Just answer me.

Mr. Crittenden: Yes; I have the proof.

The Court: All right. Proceed with your case.

Mr. Crittenden: I want to show that the trustees up until the time Mr. Faries was substituted for Mr. McKee was run by two professional bankruptcy liquidators, and a man runs—

The Court: You know that does not have anything to do with it.

Mr. Crittenden: Yes, it does. None of them have any religious sympathy with this organization.

The Court: Is that one of the qualifications of the trustees, that they have religious sympathy?

Mr. Crittenden: I will show you plenty of decisions that say they should have, a receiver or anybody in there. Even *Watson v. Jones* has that point, that nothing shall be done to interfere with the religious uses of the property.

The Court: Proceed.

Mr. Crittenden: I want to show that these men have not been in sympathy, and that one of the counsel here has made derogatory remarks about religious teaching to some of the leaders of this religious organization, expressly as to the religious teachings.

I want to show here that these trustees have carried on an administration—

The Court: By “these trustees” do you include Faries?

Mr. Crittenden: Well, he has been outvoted, I understand, on all these matters I am discussing.

The Court: I say, do you include Faries or do you mean only the two?

Mr. Crittenden: As far as the carrying on of the money, my record only goes up to the middle of 1947, and that is when he took office.

(Tr. page 22.)

The Court: I just want the record to be clear.

Mr. Crittenden: Yes, sir.

The Court: As to what you mean. You mean all three trustees?

Mr. Crittenden: Up to the middle of 1947 I have the estate status as to 1947, as prepared by one of the church affiliates here, from the record of which your Honor takes judicial notice, showing an estate starting out with about \$2,600,000 as initial inventory, and actual cash expenditures of \$2,207,936.38, as shown by the reports of the trustees themselves; costs of administration, attorneys fees, salaries, overhead and such charges as that amounted to \$277,089.09; and that the estate has wasted down to approximately \$661,000 of value.

I understand there have been some sales since Mr. Faries has taken office. This was before he took office. And there is probably—I think the cash balance shows around three to four hundred thousand dollars. I even got that in the statement here.

That the actual allowed claims of general creditors is \$111,364.79 as shown by the records of this court, and not one cent of dividend has ever been



paid, nor is there any indication that it will be paid until the trustees are through with the handling of their tax matters.

(Tr. page 23.)

Now, I want to draw this to your Honor's attention: In this very court room Mr. Hunt sat over here, speaking—

The Court: You are making an offer of proof. Let us go ahead with the offer of proof.

Mr. Crittenden: Eight hundred some thousand dollars, 900,000 of taxes, and the only way it was ever settled was that the general counsel of the Treasury Department came in here and offered \$125,000 to make settlement, and I understand it finally reached \$130,000 plus interest.

The Court: He never made any offer in this court. He said he was going to recommend.

Mr. Crittenden: Recommend, that is what I mean. He recommended settlement. In other words, the figure originated from him, the basis of settlement originated with the general counsel.

But all of this time, for two years, no real bona fide effort has been made to apply Chapter—correction—Tax Act, Section 101, Subdivision (6) or Subdivision (18), both of which exempt the corporation from taxation. No bona fide or any effort under Subdivision (18) which is applicable to apostolic societies, which this religious society is organized and conducted as, which is exempt under the Act.

In addition, there has been no effort to fight or set aside the claim of the State's taxes and unem-

ployment insurance on the ground of the Federal Court decision in the case of Israelite House of David, which holds that an apostolic society is not subject to tax for want of employer-employee or master and servant relationship; and that that tax matter has now gone for a year and a half, almost two years, and it still is unsettled as far as the State matters are concerned, and it will remain that way and interest commence to run as long as these who are administering the estate continue it. I want to show that, your Honor.

(Tr. page 24.)

I also want to show that the trustees solicited donations by going to these various people who are on projects, and who said, "We will close up this place lock, stock and barrel," or words to that effect—we will close up your church and everything with it that you leave to your church; and I have in the record, which I will read into the record in a moment, and make an offer of proof of the very statement and the answer which followed in open court.

Now I am going to start in on the records we have of the transcripts.

The Court: You just make your offer of what you expect to prove and I will rule on it. I do not want you to read any voluminous transcript in connection with your offer.

Mr. Crittenden: All right.

The Court: Just tell me the facts you propose

to prove in support of the second ground of your motion.

(Tr. page 25.)

Mr. Crittenden: On the White case decision of Referee Brink, a transcript of the reporter, August 8, 1946, haec verba, which is before your Honor, at page 29, line 2, quoting:

“Now it is true there is not any evidence here of the falsity of anything in Mankind United;”—

The Court: I have read all of that.

Mr. Crittenden: Well, I have to read it to make an offer of proof, your Honor.

The Court: Do you want to make as a part of your offer of proof the record in the White case?

Mr. Crittenden: No; just these decisions.

The Court: The remarks of the Referee in deciding the White case?

Mr. Crittenden: I have set them out.

The Court: Very well; they will be deemed copied as part of your offer of proof.

Mr. Crittenden: All right.

The Court: Where are they in your brief, now?

Mr. Crittenden: Page 13, paragraph I.

The Court: Very well.

Mr. Crittenden: There is a quotation from page 29, page 4, page 46, page 40, and page 41.

The Court: All of those may be copied into the record at this juncture and may be deemed a part of your offer of proof. That is from line 16, page 13 of your brief, to line 15, page 14, is that correct?

(Tr. Page 26)

Mr. Crittenden: Yes; line 14, page 14.

(The matter above referred to is copied into the record in the words and figures as follows:)

“The ‘White Case Decision’ of Referee Brink, Reporter’s Transcript August 8, 1946 (set forth in Patrick’s Answer). Page 29, line 2: ‘Now it is true there is not any evidence here of the falsity of anything in Mankind United; on the other hand there is no evidence here of the truth of the assertions that are made in Mankind United, particularly as to the assertion that this movement was sponsored by a group which traced its existence ’way back to 1875. The reason I make the finding that the statement as to this movement’s being an organization or a group is not true is because, as I see it, the Petitioners here have no way of proving the falsity of the things that are set forth in Mankind United. Mr. Bell is the only one in possession of the necessary information or who would be able to produce evidence here that things said in ‘Mankind United’ are true, particularly that this was or is a group movement or an organization.

“Page 4, line 26: ‘The Respondents in the Petition in Reclamation are, of course the Trustees. So

(Tr. Page 27)

the parties to the Petition in reclamation are, on the other hand, Mr. and Mrs. White and, on the other hand, the Trustees in Bankruptcy in this proceeding. The bankrupt corporation, through its counsel, has actively participated in this hearing in what we have come to call the ‘White case.’ Technically, however, the bankrupt corporation does not appear to be a party to the proceeding. Likewise on



the objection to the claim; the objectors are the Trustees. The Claimants, who are the Respondents, it may be said, on the objections, are Mr. and Mrs. White . . .

“Page 46, line 22: ‘So the claim and contention here that only 40 people are members certainly is not in accordance with the principles of the Golden Rule. Here is a movement, it is said, filled with fraud and deceit and untruth. And my finding is that the Whites have been defrauded by the very manner in which the movement has been operated.

“Page 40, line 11: ‘Mr. Bell has offered no proof that there were any organization of any sponsors or any other person promoting this movement than himself. And again, as already remarked, no one else could disprove these statements. Mr. Bell alone could prove them, and he alone knew the facts. The fact that he produced no evidence or even made any

(Tr. Page 28)

attempt to do so proves the falsity of the representations with respect to the existence of some kind of an organization. These representations were fraudulent and unquestionably were made with the intent to deceive. The Whites had a right to rely on these representations. The Referee finds they did rely on them and that they were defrauded and deceived. This remedy of course belongs exclusively to the Whites and is not a remedy that the trustees could assert.

“Page 41, line 16: ‘There is no evidence whatsoever here that any program ever existed. Again

nobody is in a position here to disprove it. If it existed, Mr. Bell can prove it. He failed even to try to do so. The fact that Mr. Bell produced no evidence or even attempted to do so proves the falsity of the representations with respect to the existence of his program. The representations were fraudulent and were made with the intent to deceive, for they were made with the intent to persuade Mr. and Mrs. White and others to join this movement. The Whites had a right to rely on these representations. They did rely, and were defrauded and deceived. The remedy in this action and on this point of course belongs to the Whites and not to the Trustees."

(Tr. Page 29)

Mr. Crittenden: In my memorandum, on page 15, copy from the Petersen Transcript of March 20, 1947.

The Court: That will be deemed a part of your offer of proof, page 15, line 25, down through line 25 on page 16; is that correct?

Mr. Crittenden: That is correct.

The Court: That will be copied.

(The matter above referred to is copied into the record in the words and figures as follows:)

"Petersen Record Transcript. March 20, 1947, 10 A.M.:

"Pg. 102, Line 4: 'The Referee: All right. Now as to the matters that are on the calendar this morning—take the Petersen matter, for instance—if it is stipulated by the Trustees and by the Petersens, through their counsel, that the disposition of the

Petersen matter shall follow the final disposition of the White case, then we need have no further proceedings.

“ ‘Mr. Martin: If I understand the Trustees’ policy, your Honor, we can not stipulate because of the fact that there is a refusal on the part of the Petitioners—no, I mean the Respondents—in the matter to recognize or admit or state that they have withdrawn from the corporate body—or the “ecclesiastical” body, as Judge Preston likes to point out. The policy of the Trustees as to the loyal members is to make them prove their case. They are still loyal. They have not withdrawn or rescinded. Therefore there is no basis for fraud or otherwise.

(Tr. Page 30)

“The Referee: Then the Petersen matter will have to go forward; and if the same situation applies in the Moyer matter, that will have to go forward and also the Miller matter.

“Mr. Preston: If your Honor please, when we get around to this Miller and auto matter, I have a few remarks to make. The Court has already ruled or announced its ruling, or announced its conclusion at least in the Miller matter, to this extent, that, not having severed their connection with the Church organization by withdrawal or otherwise, they are not in a position to contest the title to this ranch, rabbitry, on that ground. . .

“Page 116, line 13: Mr. Martin: . . . ‘Mr. Petersen has not rescinded his relationship with the Church. He sits here, an active participant in the

Church group, and at the same time says that he has been defrauded.

“Patrick Transcript, December 12, 1946:

“Page Pg. 78, line 1: ‘The Referee: Mr. Crittenden is going into the White case; is that right?

“Mr. Hunt: That is the way it looks to me.

“The Referee: What do you want to do about it? Do you want to stipulate or not stipulate?

“Mr. Hunt: I do not think that in the case of the loyal members we want to stipulate to anything.

“Pg. 88, line 22: ‘The Referee . . . . However, this brings us squarely to a question in this case which must be decided. The Trustees in Bankruptcy have taken the position with reference to all Petitioners in the reclamation who have definitely severed their connection with Christ’s Church of the Golden Rule that the final decision in the White case shall govern such petitions in the reclamation. At least so far that has been the attitude of the Trustees in Bankruptcy. Is that correct, Mr. Hunt?

“Mr. Hunt: I am not handling that branch of the case, but your Honor knows. That must be right.

“Pg. 107, line 10: ‘Mr. Crittenden: . . . I heard in this case, in this courtroom, a woman recover her automobile on the White case, without even a petition, because it was small.

“Mr. Hunt: That is not correct.

“Mr. Crittenden: Your Honor knows that is a fact.

“Mr. Hunt: Just a moment. The reason his Honor made that decision was this: She positively



testified to my mind that the pink slip and the white slip were fraudulently obtained from her upon promises at the time and she promptly disassociated herself from the Church. Your Honor applied the White Case because she did promptly disassociate herself from the Church and all the people connected with it.”

Mr. Crittenden: I want to draw your Honor’s attention to the statement at the end of the quotation made by Mr. Hunt:

“Just a moment. The reason his Honor made that decision was this:” —

The Court: I read that this morning. I read it before coming on the bench.

Mr. Crittenden: I also want to draw your Honor’s attention to the statement of Mr. Martin that it is a policy of the Trustees that “we cannot stipulate because of the fact that there is a refusal on the part of the Petitioners—no, I mean the respondents—in the matter to recognize or admit or state that they have withdrawn from the corporate body—or the ‘ecclesiastical’ body, as Judge Preston likes to point out.”

You will notice that.

And then I want to read into the record a portion of a transcript of May 17, 1946 before Referee Brink in this case, which came before your Honor and then went to the Ninth Circuit Court of Appeals, where the Ninth Circuit held that Mr. Bell was within his right to accept personal gifts of monies received after the bankruptcy. And I will start on page 117, the last two paragraphs.

(Tr. Page 33)

“Q. By Mr. Olney: Mr. Bell, I understand that you have testified that since the date of bankruptcy members of Christ’s Church of the Golden Rule have remitted to you certain moneys by way of gift?

“A. I don’t know whether members of the Church have done so or not.

“(Testimony of Arthur L. Bell)

“Q. Well, did I not understand you to say—

“A. They might have. I just don’t remember them having done so.

“Q. —that the Corporation had passed a resolution authorizing these members to obtain employment on the outside and remit funds to you?

“A. The resolution releasing them from their obligations of donating their services and their moneys and any inheritances that they might obtain to the Church until the bankrupt proceedings were through.

“The Referee: Wait a minute. I want to get this clear. What do you say, Mr. Bell?

“A. You Honor, I am saying that the by-laws had been amended—I don’t recall the date now, the Minute book will show—have been amended, releas-

(Tr. Page 34)

ing the individual applicants from their obligations to donate—they could if they wished, but their obligations to donate—their time and their efforts or the revenue from their efforts or any inheritances or anything they might acquire to the Church after the time that we have gotten into our litigation

with the State. In other words, our people, since the State claimed we had no Church and had no right to a Church—our people had to be released from any of the obligations to that Church other than what they might voluntarily desire to yield to the Church. And hundreds of them have been devoting their full time to the Church, gladly doing so. There are those who have felt very much incensed over this attack upon us from the State, and they have desired to go their own separate way and they have done so. And under our By-laws and Charter we have a perfect right to adjust the minutes that pertained to ecclesiastical matters, obligations of the members of the Church and its teachings. And in accordance with instructions to our attorneys an amendment of the By-laws was drawn.

“Q. By Mr. Olney: This amendment of the By-laws and the resolution were passed by whom?

(Tr. Page 35)

“A. In accordance with the Church and the By-laws they were passed by the directors.

“Q. The directors of the Bankrupt?

“A. Of the Church.

“Q. The Bankrupt?

“A. The ecclesiastical body. We consider them as such anyway. In other words, we thought this bankruptcy proceeding had no interference with the matters pertaining to our teachings or the obligations of our people to those teachings.

“Q. Mr. Bell, who passed the resolution that changed the By-laws?

“A. Those who constitute the spiritual leadership of this Church.

“The Referee: Q. Gives us the names, Mr. Bell. Who did it?

“A. Miss Nordskott, Miss Knapp, and myself.

“The Referee: Is it in that Minute book there Mr. Olney?

“Mr. Olney: If the court please, I will get it.

“The Referee: If you have it, don't ask any questions. Who did it?

“Mr. Olney: Sir, I do not have it.

“The Referee: I asked you whether it was in that Minute Book. Is it or is it not?

(Tr. Page 36)

“Mr. Olney: My information is that it is not. I have not examined it.

“The Referee: Look and see.

“Mr. Olney: May I ask a question of the witness, your Honor?

“The Referee: Yes.

“Mr. Martin: When did you pass this resolution, Mr. Bell?

“A. It was first discussed in August or September of 1945, agreed upon then, put into final form whenever the date of the resolution may be. I don't know the date of the resolution at this moment.

“Q. What is your best recollection?

“A. I don't care to guess on it. Since you have the Minute Book, Mr. Martin, I would like to have you present it.

“Q. By Mr. Olney: Mr. Bell, I understand you



to say it was passed after the filing of bankruptcy in November, 1945.

“A. It was discussed in August or September, when we felt there might be an attack on our Corporation.

“Q. This is a copy of the Minute Book. I will ask you to point out any such resolution.

“I might state, if the Court please, that I examined it just now from the cover to the end of the book and there is no such resolution in there.

(Tr. Page 37)

“The Referee: Well, I should like to have counsel for the Bankrupt Corporation know that the Court regards this as a very serious situation. The Court has been under the impression that the Trustees were continuing the business of the Corporation as it existed at the time of the filing of the Petition in Bankruptcy. Now if the officers of this Corporation have changed that situation, then there is a very serious question of whether or not the Trustees are going to continue the business of the Corporation or whether the Court will permit the Trustees to continue the business of the Corporation.

“Mr. Utley: If the court please—

“The Referee: Just a second. I want to explain to you the problem so that you may explain it to your client. We have assumed that the Trustees were continuing to receive the same revenue from the business of this Corporation as the Corporation itself received—at least before the appointment of the State Court Receiver. If that is not the fact, then I doubt very much whether this Court will con-

tinue the authorization of the Trustees to operate this business, particularly in view of the figures disclosed by the audit of Arthur Young and Company in this court room this morning, that it is going to cost us from now on some \$18,000 a month to continue this operation. If there are any finances diverted by any action of Mr. Bell or his associates, then I think the trustees are going to have to close up lock, stock, and barrel." That is the end of that quotation.

(Tr. Page 38)

I also want to prove that the Trustees in Bankruptcy collected all the donations that the society had, from their appointment until the 30th day of September, 1946, which your Honor very wisely stopped that practice; that they ran a seminary in San Francisco, a religious seminary; they carried on the religious work of the society, the trustees in bankruptcy, this honorable court's agency, carried on the religious activity; that they solicited the donations; they put on the mantle of the church and went forth, literally shook the tambourine, and when they did make donations, as in Petersen's case, they retained all those amounts of money of his own earnings from his own business and services and his wife's services, and they impounded all those and said, "You can't have them."

The Court: Do you mean by that, that members of the church who made contributions to the bankrupt corporation since bankruptcy?

(Tr. Page 39)

Mr. Crittenden: Indeed I do.

The Court: Of money?

Mr. Crittenden: Of money.

The Court: To what extent?

Mr. Crittenden: Now that is a debatable point. For instance, in the Papenhausen case in which I made an examination it must have run about a thousand dollars a month.

The Court: You mean voluntary gifts?

Mr. Crittenden: It was not quite voluntary.

The Court: What are the facts? I am asking you.

Mr. Crittenden: The facts are that the trustees said: If you want your church to exist and don't want it ended, you have to give us all the money out of your business. Papenhausen\* did it.

The Court: You are referring to the proceeds of the project; is that what you mean?

Mr. Crittenden: And services.

The Court: So-called project?

Mr. Crittenden: They went to Nellie Fitzgerald (?),\*\* a real estate broker, and they took all of her commissions, or they said we will close up the church, and they collected it from her. They could not conduct the business of a real estate brokerage firm because they had no license to do it. Women will do a lot of things for a church, your Honor. I want to prove that, too.

\*Written in pencil on original

\*\*Should be Paget

(Tr. Page 40)

I want to show that they actually went out and solicited all kinds of contributions. I will show you in this record, if you wish me to go further, where

they wanted and they required Mr. Bell to account for all gifts received, because they say they owned all gifts that were made of any sort to any official of the church. And that is the essence of this record before the Ninth Circuit.

If you want to hear me on the rest of it, I will certainly be glad to do it. Here is the very holding. Let me read a little further, and this is just from where I stopped:

“The Witness: Not a dollar of the funds—

“The Referee: Just a minute, sir. I am talking to your attorney.

“Mr. Utley: Mr. Cobb, I think, handled some of the matters that Mr. Bell is now discussing. But here is the problem, your Honor. As your Honor knows, we are disposing of these properties where certain members have been working. And that would require certain members to become idle from time to time. The problem arose as to what to do with the surplus of labor.

“The Referee: Yes?

“Mr. Utley: Now I am— as I say, I am discussing this and I am not entirely familiar with it myself. But the question arose as to whether or not these particular members who were no longer needed to operate the property of the Church should be released and those who wanted to, go out and seek employment in other fields. And they would neither be maintained by the Church nor would they be obligated to turn their revenue over to the Church.

(Tr. Page 41)

“The Referee: Yes?



“Mr. Utley: That is the situation which we have been considering all along. And I think it is going to come to that point more and more, as some of these properties are closed.

“The Referee: I appreciate that; but Mr. Bell tells us he is getting money now from envelopes and people. My impression was that Mr. Bell was a member of Christ’s Church of The Golden Rule. My impression was that members of Christ’s Church of The Golden Rule surrendered all their property to the Church. Just how he continues to get money and use it as he pleases when he is a member of Christ’s Church of The Golden Rule of course is not immediately apparent. Maybe there is a good explanation for it.”

Do you see what I mean? The court and the referee and all down there decide that anything any of these people earned or received commercially, until your Honor made that order of September 30, 1946, was their property to do with as they saw fit, to seize, to grab, to restrain, and bring them in and interrogate them under a 21A or 21J examination. I have never heard of a thing like this and I don’t know how long—

The Court: Proceed with your offer of proof, Mr. Crittenden. This is no place for argument.

Mr. Crittenden: What?

The Court: This is no time for argument. Proceed with your offer of proof.

Mr. Crittenden: (Reading)

“Mr. Utley: I think you will find there is. Certainly if a member of the Church was not main-

tained and supported any longer by the Church and it was subsequent to bankruptcy and he went out and secured him an independent job, he could do with his money as he pleased. It would be no part of the assets of this Corporation.

“The Referee: Have we got any people living on this property on Figueroa Street that are out working anywhere?

“Mr. Utley: Not that I know about.

“The Referee: What are those people doing up there? Are they just sitting there doing nothing?

(Tr. Page 43)

“Mr. Utley: You will have to ask Mr. Bell.

“The Referee: There is no use getting into an extended discussion of it. We have already set June 4, 1946, as the date for a hearing on what the Trustees are going to do with this membership setup. But if the Court in the meantime should be satisfied that there has not been turned over to the Trustees the business of this Corporation as it was in existence at the time of the commencement of the bankruptcy proceeding, the Court in the meantime may make an Order instructing the Trustees to discontinue the operation of this business, because I am not going to permit the Trustees to carry on, even until June 4th, this tremendous expense of maintaining these people, including the expense of some \$10,000.00 a month for this institution in San Francisco, if I have any reason to believe that any money which should belong to this Corporation is being diverted or is being—

“Mr. Utley: I have understood and I have told

Mr. Bell that that could not be done. I did tell him, however, that if the Corporation released the members from their obligation of contributing everything to the Church and the Church no longer supported them and they got out and worked on their own, it was their own business what they did with their money.

(Tr. Page 44)

“The Referee: But we are not going to feed them.

“Mr. Utley: I gave Mr. Bell to understand that we would not feed them, and I do not understand that we are.

“The Referee: We are not going to feed them, and we are not going to let them live—

“Mr. Martin: If the Court please, I am clearly under the impression that at Silver Avenue we have over two hundred people supported by the Trustees, many of whom are engaged in outside labor.

“The Referee: For compensation?

“Mr. Martin: So I understand.

“Mr. Bell: Not one dollar of the Trustees' money has gone for the support of those people, not a dollar. The auditors can verify that fact. If they are carrying on their school work and their studies, they live where they have always lived. They pay \$7.50 a week or they bring in food to the college. They do not take a dollar of this estate. And there has not been a dollar of any project that has not gone to the Trustees of this estate, not a dollar.

(Tr. Page 45)

“The Referee: Maybe one of these days I will have to get on a plane and go to San Francisco and go to that institution and myself find out how it is being run. You say they are paying \$7.50 a week. Do you realize it is costing us \$10,000.00 a month to run that institution there? That is \$50.00 per month per person. If there are two hundred people and your employees are only paying \$7.50 per week, they are not paying enough money.

“The Witness: That covers training and instruction and literature. The food costs are less than \$25.00 a month your Honor.

“The Referee: I don’t care what the food costs are. I am looking at the total bill up there.

“The Witness: They are paying their share of their living expenses, your Honor. It has been carefully calculated. Wherever they live and are carrying on their training, they are paying their share.

“The Referee: Whom are they paying it to, this \$7.50 a week?

“The Witness: To the project—or bringing in food, one or the other. I don’t know how it is handled.

“The Referee: How?

(Tr. Page 46)

“The Witness: Either paying it to the project or bringing in food.

“The Referee: Does any one have that auditor’s report of this morning? My impression was that the Seminary was a dead loss; that there was no income coming in from it.



“Mr. Martin: I do not have the auditor’s report. On that point, however, it clearly is a dead accounting loss. We always put it—

“The Referee: I mean that there was no revenue at all on it.

“Mr. Martin: That I can not verify for the Court; I don’t know.

“The Referee: All right, gentlemen, I am sorry to interrupt you, Mr. Olney; but I want counsel to understand the seriousness of this situation here. Go ahead. And that is why, counsel, if this institution is going to be preserved there must be the utmost frankness with the Trustees and this Court on the part of everybody that has anything at all to do with it, including Mr. Bell.

“Mr. Utley: Your Honor, I have tried to impress that on Mr. Bell.

“The Witness: I am making the out-and-out statement, your Honor, that not one dollar of that money has ever—

(Tr. Page 47)

“The Referee: That is your conclusion.

“The Witness: It is not. I have known the people for years.

“The Referee: When I say ‘the utmost frankness’ I mean that you cannot speak in generalities, you must give us figures, must tell us how much it amounts to, so that you will know the seriousness of the situation.

“The Witness: Would you like to have me bring some of the people here, your Honor?

“The Referee: No, I want you to be frank on the

witness stand and tell us what you know about the situation. Go ahead, Mr. Olney.

“Q. By Mr. Olney: Mr. Bell, will you kindly point out the resolution in the Minute Book to which you referred?

“A. Well, if it is not in the Minute Book, Mr. Olney, I will have to check through Mr. Utley’s office and check up with the secretary of the Corporation to find out why it is not there. I can’t read through the whole Minute Book now. I will check up and give— I will get the information for you and a copy of that meeting.

“Q. Mr. Bell, did you examine the Minute Book there in front of you from August, 1945, to date?  
(Tr. Page 48)

“A. It is too much of a task to read through all of it here, Mr. Olney. I will get the information and have it for you tonight if you wish.

“Q. Didn’t you just say now—

“A. I didn’t, no. I glanced at it and didn’t recognize anything that indicated this meeting. I couldn’t go through the entire book.

“Mr. Olney: I would like to show it to the Court, at least for that period from August to date, simply to establish the fact that it is not in there.

“The Referee: Mr. Olney, how long has this book been out of the possession of the officers of this Church?

“Mr. Olney: I do not know, sir.

“The Referee: Do you know, Mr. Martin?

“Mr. Martin: My recollection is at least since January 8th or 9th. Mr. Bell would know.

“The Referee: I just gathered from what Mr. Utley said that this resolution was something that at least had been considered rather recently.

“Mr. Utley: I think—if my memory serves me correctly, it was considered since the book was turned over.

(Tr. Page 49)

“The Referee: Yes, that is what I would think.

“Mr. Utley: In other words, we saw ourselves being confronted with the problem—and, as I say, Mr. Cobb handled it principally—but we were trying to devise ways and means of meeting it. And I know it was discussed at that time.

“The Referee: Well, I want to know, Mr. Martin—will you be good enough to inquire from the Trustees if there are any people being maintained in any institution supported by the Trustees who are working for wages or salary; and if they are, then the Trustees will determine how much those people have to pay for their maintenance and support in this institution—or in the institution in which they are living. And \$7.50 will not be sufficient according to present wages and present costs of living. It is obvious, Mr. Olney, that the resolution is not in here; but I think the explanation is that if it was enacted it was probably after that book was turned over.

“Mr. Martin: May the record show that the last resolution in this book is November 9, after the date of bankruptcy, your Honor?

“The Referee: All right.

(Tr. Page 50)

“The Witness: The matter was discussed in August and September of 1945. I will get a copy of the actual resolution and have it made available.

“The Referee: Mr. Bell, if that resolution was adopted before November 9, 1945—

“The Witness: It should be in the book.

“The Referee: —we want to know, why it is not in the book.

“The Witness: It should be. I am quite sure it was after November 9th. How soon, I don’t know. It must have been after November 9th.

“Q. By Mr. Olney: Mr. Bell, these persons who were formerly members of Christ’s Church of The Golden Rule who are now earning wages on the outside—that you have mentioned—I will ask you if it is not a fact that they are donating fifty per cent of the wages which they earn to you personally.

“A. I can not say that is a fact, Mr. Olney. If they are persons who want to make gifts to me, they may make gifts of everything they have or one per cent of it or any part of it—I don’t know.

“Q. I am talking, Mr. Bell, of what has happened since the 19th of November, 1945 and of members of Christ’s Church of The Golden Rule who are now working for some one else and realizing wages. Are they not sending a portion of the funds which they thus earn as donations to you personally?

(Tr. Page 51)

“A. I can’t tell which ones may have been doing it, Mr. Olney. I will say this: That it was deter-



mined back in August and September of last year that should the attacks which we felt were on the verge of being directed against us—should they interfere with the activities of our Church, that some of our people would move away from the obligations of the Church and provide such funds as I might personally need. When the State Receivership came in and it appeared my hands and the hands of the officers of the Church would be completely tied, we took a step a little further along the trail to determine ways and means. And after the bankruptcy proceedings it was evident that I would have no use of any funds belonging to the Corporation nor would the officers of the Corporation nor any project manager have any right to use any moneys except under the direction of this Court; that if we wished to do anything at all in connection with our activities and our ministry that was dependent upon money, we would either have to go into Court and ask for funds or we would have to arrange for some activity outside our student-

(Tr. Page 52)

ministry training projects on the part of individuals to supply such funds. Rather than build up budgets for specific purposes, it was decided that again there would be no obligations of any kind in connection with those funds; that it would be a gift to me and I could use them as I might see fit. I can make this statement: That I am positive that there has not been a dollar from any project under the direction of the Trustees where any instructions have been given to have such moneys sent through

to me—because specific instructions have been given to account for every dollar to the Bankruptcy Trustees, and I am convinced that that can be done to the dollar. What moneys have gone into my hands from various sources—a number of our people and former associates have known that we were faced with the necessity of having some funds that we didn't have to explain to the Trustees or any one else, something that we wouldn't be holding the Bankruptcy Trustees responsible for our activities. After all, they are not the spiritual heads of our Church, and there are many expenses which they seem to be disinclined to meet. There are many steps which I still think necessary to take for the protection of this Church. I cannot come to this Court and ask for its assistance. It isn't possible. From what Mr. Martin tells me, it is outside the realm of bankruptcy procedure for me—

“Q. Since November 19, 1945, you have been receiving funds which were raised in the manner which you just described?

“A. Some time since that date; I don't know how long since that date.

“Q. And those funds have come from persons who were formerly members of Christ's Church of The Golden Rule?

“A. I don't know. Some funds may have, yes. Some persons from the Church—in fact, there is no question but that some persons from the Church have withdrawn from activity on the projects and have gone their separate ways to make such funds as I have described to you available to me.

“Q. And you have received those funds, have you not?

“A. I have received some funds.

“Q. What did you do with the money?

(Tr. Page 54)

“A. I have used such money in accordance with my own discretion, Mr. Olney.

“Q. What did you do with it?

“The Referee: Well I will settle that, Mr. Olney. All right, Mr. Reporter, take this in the record:

“Mr. Martin prepare a written Order. Mr. Arthur Bell, who is now on the witness stand and who is the president of the Bankrupt Corporation, is directed to file in this Court, within ten days from the date hereof, a verified report of all moneys which he has received from any source whatsoever, in detail, since November 19, 1945—together with a verified report on the manner in which the money so received has been disbursed by him. Please prepare that Order. It is now an Order, made in the presence of Mr. Bell and taken down by the Official Reporter of this Court.”

I might add that the Ninth Circuit set that order aside.

It is difficult to set forth all the matters which the parties I have brought here might testify to, so I will have to be content with the statement of the offer as I have made it.

(Tr. Page 55)

The Court: You may state the ultimate facts. Are there any other facts you propose to prove in support of this motion?

We will take the morning recess at this time. Five minutes.

(Short recess.)

Mr. Crittenden: If your Honor please, on an order of proof it is extremely difficult for me to put in words the witnesses' statements made, that their testimony would show the insinuations of the trustees and their employees that they should leave all these through any religious society and they live apart in their religious work. Now, I make that an offer of proof. I just think—

The Court: Make your offer of proof of facts as you claim them to be.

Mr. Crittenden: One of them will testify that offers of that type were given him if he would leave his religious work.

The Court: Offered by whom?

Mr. Crittenden: One of the trustees. I think it was Mr. Boteler. I would not be sure.

And he could also prove and show that donations, up to September 30, 1946, sent in with letters of transmittal or memorandums, mimeographed sheets showing that they paid it under protest, but since it would be used for religious purposes, they were giving it for the care and support of the people in the seminary. I know that took place both in that Papenhausen and the Brant\* matter. And, of course, it would follow as a corollary that money of the Lord's purse which was funds of this estate were being used for carrying on this examination, these religious persecutions, paying for these records which I read.



(Tr. Page 56)

And I think I can further show that donations, not only of money, but also of time, effort and services which were accepted and not paid for at all by the trustees, with the statement that was the only way it could keep the church going.

I think that is about my statement of proof that I could show by these witnesses.

The Court: Do you have any further offer of proof of facts to make in support of these?

Mr. Crittenden: I would have to put Mr. Bell on the stand as to that point of his understanding as of the time of filing the petition, his acts in filing the voluntary petition.

Of course, it goes to the second point, that is the one of jurisdiction, this consent, but his belief was what was stated, what you might classify either under mistake or extensive fraud. I don't know which you would call it. As to when he went into this, in filing the petition in bankruptcy. I have set that forth as one of my grounds of the motion. Of course, that goes to the consent of bringing the corporate entity under the jurisdiction of the court.

(Tr. Page 65)

\* \* \* \*

Mr. Crittenden: Call Mr. Bell.

Mr. Hunt: If your Honor please, on behalf of the trustees in bankruptcy, so far as the second ground is concerned we object upon the ground—is the offer over? I can't tell. If it is, I would like to put an objection on the record.

The Court: Yes; there has been a completion of the offer of proof, except as to the testimony Mr. Crittenden proposes to elicit from Mr. Bell, as I

understand it. Is that correct?

Mr. Crittenden: That is right, your Honor.

Mr. Hunt: I do not want to make my objection until the offer of proof is finished. Now is it finished or not?

Mr. Crittenden: Yes, it is finished.

Mr. Hunt: On behalf of the trustees in bankruptcy I object to the offer of proof upon the ground that whatever happened since the bankruptcy, whatever the officers of this court did, trustees, receivers, counsel, or the referee in bankruptcy, is incompetent, irrelevant and immaterial upon the question of the right of this court, whether it had jurisdiction to make this adjudication upon the voluntary application of the bankrupt itself. Also, that whatever happened before bankruptcy outside this court is also incompetent, irrelevant and immaterial upon the jurisdiction of this court to pass upon a voluntary petition in bankruptcy which is correct on its face, and make or not make the adjudication.

(Tr. Page 66)

The Court: I will reserve ruling on that objection.

Mr. Clerk, will you swear Mr. Bell?

The Witness: I wish to affirm, please.

ARTHUR L. BELL,

called as a witness by Petitioners, being first affirmed, was examined and testified as follows:

The Clerk: Please state your name for the record.

The Witness: Arthur L. Bell.

Direct Examination

By Mr. Crittenden:

Q. And your residence, Mr. Bell?

(Testimony of Arthur L. Bell.)

A. 1201 California Street, San Francisco.

Q. Referring to this church, Christ's Church of the Golden Rule, what position or relationship have you held and do you now hold in that group?

A. Church trustee and ecclesiastical head of the affiliated Christ's Church of the Golden Rule.

\* \* \* \*

Q. Mr. Bell, in that corporation, its temporal agency of the Christ's Church of the Golden Rule, a California corporation, do you hold any position in that?

A. As president and director, also as church trustee.

Q. Referring to the fall of 1945 were there proceedings commenced in the State court?

A. There was.

Q. What was it?

A. A receiver was appointed to take over the church and its properties.

Q. Do you remember the approximate date there?

A. I believe it was October 10th, 1945.

Q. When was bankruptcy first mentioned or discussed by you with anyone?

A. The latter part of October.

Q. Who with?

A. With Mr. Parsons over the telephone. He was in Oregon at the time. With Mr. Wirin in person, and with Mr. Utley in Mr. Utley's office, Ernest Utley of Los Angeles.

(Testimony of Arthur L. Bell.)

(Tr. Page 68)

Q. Did you say anything before the discussion to Mr. Utley?      A. What was that, sir?

Q. Before you went over to Mr. Utley was anything mentioned? How did you happen to go to Mr. Utley's office?

A. Mr. Parsons told me that he had some extended discussions with Mr. Utley about our problem and the State receivership; that Mr. Utley was familiar with the nature of that problem and would be able to advise me relative to matters of bankruptcy.

Q. Did he state anything to you about what the bankruptcy proceedings were, Mr. Parsons or Mr. Wirin?

A. Not other than the fact that certain assets would have to be put in the care of the court to guarantee our listed creditors and to make sure that such creditors were paid as we might list as creditors.

Q. Then you went to Mr. Utley's office. How long was that before the petition was filed?

A. I think it was only a day or two.

Q. And that is when you filed the Chapter XI proceedings?      A. That is correct.



(Testimony of Arthur L. Bell.)

(Tr. Page 69.)

Q. You did discuss this with the board of directors at a meeting on November 1st?

A. Yes.

Q. What was the discussion?

Mr. Hunt: If the court please, I object to any further questions along this line upon the ground it is incompetent, irrelevant and immaterial what discussions they may have had among themselves in the face of the fact that the records of this court show that they not only filed this Chapter XI proceeding, the bankrupt did, but, pursuant to resolution duly adopted by the church corporation, and later on, filed the voluntary petition in bankruptcy in the same case upon a resolution of the same board of directors duly adopted, and upon the basis of that petition this court made the order of adjudication which is here attacked.

The Court: Do you propose to impeach the resolution attached to the petition?

Mr. Crittenden: I want to show what was the manifestation, as your Honor said, of the outward signs of the parties' minds, to show the reality of consent. If you want me to ask the man what he believed at that time, I will do that; but I thought it would be better to take it up as to the manifestations.

The Court: Do you think it would be competent?

Mr. Crittenden: State of mind, yes, a state of facts.

(Testimony of Arthur L. Bell.)

(Tr. Page 70.)

The Court: Suppose the bankrupt came in here and said, "At the time I signed that petition, I did not know I was getting into this," would that be a ground for setting it aside?

Mr. Crittenden: If he did not know what it was. That is what we set aside these property settlement contracts and promissory notes and other business deals on—on that very basis that they did not understand what they were doing. They may well have thought there was a contract at the time, but they did not realize its premises when they are alleging sometimes—sometimes we call it "fraud" and sometimes we call it "mistake".

The Court: Who is alleged to have caused the mistake?

Mr. Crittenden: That is a question.

The Court: Between whom is the issue?

Mr. Crittenden: The question is as to the reality of the consent in bringing the corporation before this court.

The Court: I will hear it. Objection overruled.

Mr. Hunt: If your Honor please, I would like to have the record show that these resolutions I spoke of, a certified copy of those resolutions are of record here in connection with the two petitions, the petition filed on the Chapter XI and the petition in bankruptcy. They are in the record here as exhibits attached to the two petitions for that relief.

(Testimony of Arthur L. Bell.)

(Tr. Page 71.)

Mr. Crittenden: I believe there is only one and that is of November 1st, Mr. Hunt. Am I wrong?

Mr. Hunt: Both those. There were resolutions both for the November 1st petition and the resolution for the bankruptcy petition. I have here the minute book if you wish to examine it.

The Court: Do you have a record of the hearings that were had prior to adjudication? Were those transcribed?

Mr. Crittenden: Yes; they were, your Honor.

The Court: Do you have a record of them?

Mr. Crittenden: I have mimeograph copies of them.

Mr. Hunt: I haven't them, your Honor.

Mr. Crittenden: I brought them down, reading them on the train last night. It was done very hastily. There was a transcript of November 6th.

The Court: That was the first hearing.

Mr. Crittenden: November 13.

The Court: Were those the only two days?

Mr. Crittenden: No; there is another one. And then there was one of November 15th and November 16th. If it was just, your Honor, a question of refreshing your recollection, I could loan you those copies.

The Court: I just supposed that there was a record made and they would probably be offered in connection with this motion.

(Testimony of Arthur L. Bell.)

(Tr. Page 72.)

Mr. Crittenden: There is nothing in the record tending to show a statement of intention that they would file it that afternoon.

The Court: Wasn't there some discussion about the filing and weren't there some formalities that took place here in the court room, such as other parties who had not theretofore signed signing?

Mr. Crittenden: I remember, your Honor, a statement—this is roughly by skimming—your Honor said something about a voluntary petition would be entertained but an involuntary could not be, barely that point of jurisdiction to file a petition; and also that the misuse of the temple of the court to avoid a State decree of dissolution. And I think your Honor on another hearing said that the question of dissolution would be entirely collateral to any bankruptcy proceedings.

The Court: Of course, there could not have been an involuntary adjudication against a religious institution, so it had to be voluntary if there was an adjudication at all. That was the assumption, at least, as I recall the discussion; and, as I recall, also, the petition was brought here, was signed by the secretary, I believe, of the corporation.

Mr. Crittenden: That is right.

The Court: I declined to entertain it until it had been signed by Mr. Bell.

(Tr. Page 73.)

Mr. Crittenden: That is right.



(Testimony of Arthur L. Bell.)

The Court: And someone else, I believe; and, as I recall, that was done here in open court.

Mr. Crittenden And the petition was signed—signed by the two, Mr. Bell and Miss Knapp as secretary-treasurer, although there was a considerable point raised, probably with considerable merit, that the by-laws or the articles of incorporation did not give the secretary-treasurer power to exercise that duty. It was gone into rather thoroughly at the time. I think your Honor was inclined to that view on the original Chapter XI proceedings, which was something I read last night in a hurry on the train.

The Court: You may proceed with your direct examination.

Q. By Mr. Crittenden: Mr. Bell, what was that discussion at that first meeting of the board of directors on November 1, 1945?

Mr. Hunt: If your Honor please, may it be understood that my objection is made to all these questions on the same grounds as previously made, and the court is reserving its rulings?

The Court: As to any discussion had leading up to the resolution of the board of directors.

Mr. Hunt: Or leading up to the adjudication, your Honor.

(Tr. Page 74.)

The Court: Is that stipulated?

Mr. Crittenden: It is; yes.

The Court: Very well.

(Testimony of Arthur L. Bell.)

A. A general discussion was had pertaining to the effect of the state receivership and the attempt to ransack the various seminaries and church properties, personal belongings of our affiliates, and drive our people into the streets, take them out of their homes and seminaries, and the necessity for some action which would place us under the protection of the federal courts in their duty to enforce the Constitution and Bill of Rights, to make sure that our rights of religious freedom might be preserved and safeguarded, to seek that protection and to have the properties removed from the hands of those who were ransacking and destroying them as rapidly as we could; that we would have to show our good faith and willingness to cooperate in the paying of any of the listed creditors that we had on our records at that time; that we could not just put up enough property to pay the \$111,000, but that we would have to place all of our property in the care of the court until that \$111,000 was paid.

That we would carry on our church activities as formerly, but we would not be able to sell any properties without the consent of the court, not be able to pay out any monies without the court's auditor's consent; that otherwise we would go on as before, having the protection of the federal courts in shielding our rights of religious worship and in carrying out our charter and the by-laws of our church, and making sure that no attack was made upon our rights of religious freedom; and

(Testimony of Arthur L. Bell.)

that the estate was safeguarded against dissipation or destruction; that the purposes of our charter and by-laws might be carried out, and that every effort might be made to make sure that those purposes were carried out.

That the court's responsibility would be to understand the nature of that charter and by-laws, the nature of our church activities, and to be sure that every dollar spent would be spent to carry out those purposes.

We felt that the federal courts having the responsibility of shielding the rights of all American citizens would be impartial; that they would not be prejudiced because we were an unpopular religious minority, but would be primarily concerned in making sure that all of our rights were safeguarded and that we had the right to worship God as we saw fit, and to illustrate our religion as we might see fit; and that the assets of the church would be audited to make clear that all of those assets had been used in that way and had not been misused, which we were quite willing to have made. In fact, we have spent a great many thousands of dollars in preparation of such audit ourselves.

(Tr. Page 76.)

The Court: You were questioned as to what took place at this directors' meeting.

The Witness: I am telling you what took place, your Honor, in considerable detail. This was all discussed at that meeting. The other two directors

(Testimony of Arthur L. Bell.)

and myself, in Mr. Utley's office, discussed the matter with Mr. Utley.

The Court: Is this the same directors' meeting?

The Witness: The same directors' meeting.

The Court: Was it held in Mr. Utley's office?

The Witness: In Mr. Utley's office. The Section XI proceedings were described as a proceedings that would enable us to carry on our activities under the direction of the court and with court auditors verifying our proper use of funds and the issuance of such funds to carry out the purposes of our charter and by-laws. In other words, there would be no misuse of funds or had been no misuse of funds.

We were quite willing to come under the complete control of the federal courts in the preservation of the society and the rights of our people to worship God as they saw fit. We felt we needed this protection when Robert Kenny and certain union communists were trying to take away our church and—

The Court: Was this discussed at that meeting?

The Witness: This was all discussed in detail.

The Court: Was Mr. Utley present?

(Tr. Page 77.)

The Witness: He was present at part of this discussion. We felt that certain union communists in the state had been able to use Robert Kenny as the spearhead—

The Court: Not what you felt. I want you to



(Testimony of Arthur L. Bell.)

tell me when Mr. Utley was present and when he was not present.

The Witness: He was present at the time we discussed the effect of the Chapter XI proceedings, that we would carry on our work and under the jurisdiction of the court that we would have a right to carry on our activities as before, but under the close scrutiny of the court, which we were quite willing to have.

The Court: Was anyone else present besides the directors and Mr. Utley?

The Witness: I believe not.

The Court: Was Mr. Parsons present?

The Witness: No, I think he was in Oregon at the time. I believe Mr. Wirin was occupied with other engagements and was not able to be present.

Q. By Mr. Crittenden: That was when the resolution was passed and when the petition was signed, was it?

A. Yes; about that time.

Q. When was the first mention of a voluntary petition in bankruptcy made in your presence and hearing?

(Tr. Page 78.)

A. After November 1st certain State agencies, Mr. Manaugh and his agents continued to ransack our properties and to try to remove our people. And when we found that this court would not entertain the Chapter XI proceedings, our people were going through so much harassing at the time,

(Testimony of Arthur L. Bell.)

we had to move into some other type of proceeding that would give them protection; and it was then suggested that the voluntary proceeding be filed.

Q. Who was the first one that said it, and where were the parties and who was present?

A. Well, I believe, in this court, that the matter was presented, that the only type of proceeding the court would accept or recognize would be a voluntary proceeding; that it could not recognize a Chapter XI. I think that was the first time that the thought was presented to us.

Q. When was the next time it was mentioned, and who was present and what was said?

A. Well, after some days of discussing the Chapter XI proceeding in this court, we reached an impasse. Mr. Manaugh and his state men were still ransacking our properties. Something had to be done very quickly and the voluntary proceeding was then mentioned by Mr. Utley, and our directors were called in his office and at that time it was then discussed.

Q. What was said and who said it? Give us close to the exact words as you remember them. Was Mrs. Knapp present?

A. Yes; Mrs. Knapp and Miss Nordskott were present.

Q. Who else?

A. Miss Nordskott and myself. There was not a great deal of discussion about it, Mr. Crittenden, it was done so rapidly. We had been going day and

(Testimony of Arthur L. Bell.)

night and about 20 hours a day, all three of us, and the papers were drawn in Mr. Utley's office that would cover the proceeding, and it was stated at our meeting—

Q. Who said it?

A. Mr. Utley. —that our assets in toto would have to be turned over to the court to secure the creditors who were listed in our schedules and to assure the payment of such debts as were listed on those schedules; that the purpose of the court in preserving our rights of religious worship and carrying on the activities of the church under its charter and by-laws would be the same; that the trustees would take over my responsibilities and would take over the handling of the church affairs in the same way that it had been my obligation to handle them, only to make sure that the monies were used to carry out the charter and the by-laws and that no money was misused and that no attack was made upon the church which might jeopardize the rights or interests of those \$111,000 creditors; that we would have to consent to the sale of sufficient properties to pay the \$111,000 of creditors. And being anxious to complete the matter as quickly as possible, we consented to the sale of our choicest property, the Continental Building.

Q. Was that discussed at the time?

A. Among our directors. I do not recall whether Mr. Parsons or Mr. Utley was there at the moment.

(Testimony of Arthur L. Bell.)

Q. I am referring to this second meeting. What was discussed and what was said?

A. Well, that was the general substance of it, Mr. Crittenden, that we would have to consent to the immediate sale of some property to clear this \$111,000 in creditors, or whatever our schedule of creditors might be that we would add to the list.

Q. And what would happen then?

A. Then that we would be relieved, the court would release us, and we would carry on our business ourselves, inside of and under the close scrutiny of the court.

The Court: Is that about all that Mr. Utley said?

The Witness: That is about all Mr. Utley said.

The Court: What you have recited here in the last two answers is what Mr. Utley told you?

The Witness: That is right. I had no understanding of the matter other than the court would preserve the estate and preserve our rights to function as our church, as we formerly had, but under the close scrutiny of the jurisdiction of the court.

(Tr. page 81.)

The Court: That is what Mr. Utley told you?

The Witness: That is right.

Q. By Mr. Crittenden: Did anybody say anything to you that the trustees would run or hold the property free and clear of its religious uses?

A. At no time; at no time. We thought that they would take what we had and that was an ob-



ligation to carry out the charter and by-laws of our church with such assets as the church might possess; they would have no different rights than we had, no greater ownership than we had; they would merely have whatever trust responsibilities we possessed and would be obliged to carry out this trust responsibility as under the jurisdiction of the court.

Q. Was that the time the petition was filed and signed, in relation to that time was it that afternoon or the next morning?

A. I don't recall whether it was afternoon or in the evening. We went through the evening and most of the night. I think we worked three or four nights until daylight. I think we worked in Mr. Utley's office. I think our people—

Q. Or was that preparing schedules?

A. Yes; preparing schedules.

Q. Following that did you discuss the nature of the adjudication at that time?

(Tr. page 82.)

A. Not other than I stated to you. We thought we were handing my mantle over to court officers to carry out the purposes of the charter and by-laws.

Q. Was this ever submitted to any members of the membership or the group to vote or consent?

A. It was not done, Mr. Crittenden, because we felt the charter and by-laws were very clear and the court would be obliged to carry out the purposes of the charter and by-laws. The members had al-

(Testimony of Arthur L. Bell.)

ready consented to them and signed them. We saw no reason to take the matter up with them.

Mr. Crittenden: That is our proof.

Mr. Hunt: If your Honor please, I have no cross examination, but I would ask leave to put on testimony of Mr. Utley, without withdrawing or waiving the objection previously made, in view of the fact that your Honor is reserving ruling on my objections and permitting this testimony to be taken.

The Court: Does anyone have any questions from Mr. Bell?

Mr. Hunt: No.

The Court: You may step down, Mr. Bell.

Have you any other witnesses, Mr. Crittenden?

Mr. Crittenden: Yes, your Honor.

The Court: Does that complete your offer of proof and the testimony in support of the motion?

(Tr. Page 83)

Mr. Crittenden: That is right, your Honor, but, of course, the motion is made on the records before your Honor, of which your Honor takes judicial notice. I don't want to put those on the record.

The Court: I will take judicial notice of all that has gone before that is a matter of record in the proceedings.

Mr. Crittenden: That is right.

The Court: If you so desire.

Mr. Crittenden: Yes. Your Honor has to take judicial notice of the records—excuse me—the court

has to take judicial notice of its records and proceedings in the case, and I did not think it was necessary to do more than point it out in my brief.

The Court: It is only necessary to call it to the court's attention.

Mr. Crittenden: Yes, sir.

The Court: So the court can have judicial knowledge, in order to take judicial notice. That is right.

You say you desire to take some testimony?

Mr. Hunt: Yes, if your Honor please. Judge Utley.

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ERNEST R. UTLEY,

called as a witness by Trustees, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

(Tr. Page 84)

The Witness: Ernest R. Utley. Your Honor, the fact that Mr. Martin and I are both here cripples is no sign that we have been in a fight.

The Court: Both of you just disabled?

The Witness: Both of us disabled.

The Court: You are appearing here as attorney for the bankrupt?

The Witness: I am attorney for the bankrupt; yes.

The Court: I did not know whether the record showed that at this time or not.

(Testimony of Ernest R. Utley.)

Direct Examination

By Mr. Hunt:

Q. Mr. Utley, you are an attorney of this court, duly admitted to practice for how many years?

A. Oh, I think I was first admitted to practice in Oklahoma in 1917, and first, in California, in 1919; and I was first admitted to the Federal Court, I believe, in 1920.

Q. And you have been actually engaged in matters in this court and the State courts of California since that time?      A. I have.

Q. Were you ever a referee in bankruptcy of this court?

(Tr. Page 85.)

A. From 1936 until March of 1945.

Q. Then what happened?

A. Well, I resigned and engaged in the practice of law here in Los Angeles.

Q. When were you first approached by Mr. Bell or Mr. Parsons or any of their associates with respect to this particular case?

A. Well, I was first approached by Mr. Parsons, I think it was a Saturday, about a week—it was on a Saturday, but it was about a week or maybe a few days over a week before the proceeding was actually filed.

Q. And what discussion did you have with him at that time?

A. Well, the discussion was not extensive be-



(Testimony of Ernest R. Utley.)

tween Mr. Parsons and I at the time. He merely stated, made some mention of the State court receivership and briefly discussed the case, and asked me what I thought of the advisability of proceeding in bankruptcy. And I told him I thought, on the brief information that he had given me, that rather than straight bankruptcy it might be more feasible under Chapter XI of the Bankruptcy Act. And he said that he thought he would send Mr. Bell down to talk to me; that he was leaving town and Mr. Bell might be in to see me. Our discussion was quite brief at the time.

Q. Any further discussion with Mr. Parsons at that time?      A. I don't believe so.

(Tr. Page 86.)

Q. When was the next discussion you had with Mr. Parsons or Mr. Bell or Miss Nordskott or Mrs. Knapp, or all or any of them?

A. Well, Mr. Wirin called and made an appointment for he and Mr. Bell to see me—oh, a few days—I wouldn't say just how many—before the petition was filed. It was late in October.

Q. Just a moment. Mr. Parsons and Mr. Wirin, were they representing these parties at the time these events occurred?

A. They were, yes; that is right.

Q. Please go ahead.

A. And in the afternoon, Mr. Wirin and Mr. Bell came in to see me. As I recall, Mr. Wirin did not stay very long at the time.

(Testimony of Ernest R. Utley.)

Before I relate all that was said, I am wondering about the confidential relationship between attorney and client. I am quite willing to talk, but I do not want to violate—Mr. Bell has testified. If Mr. Bell will relieve me of the confidential relationship, I will be glad to go ahead.

Mr. Arthur L. Bell: I shall be very happy to relieve Mr. Utley of any responsibility.

The Witness: Very well.

(Tr. Page 87.)

And Mr. Bell asked me numerous questions concerning bankruptcy and concerning Chapter XI.

Now, whether this discussion all took place at that time—there was a discussion at that time, and at the end of it Mr. Bell told me to go ahead, but he came back later and I discussed at length with him various provisions of the Bankruptcy Act and Chapter XI.

I told him that under Chapter XI, under Section 322 they could file a petition for a plan of arrangement. I explained what a plan of arrangement was—a plan to pay creditors; that the Act provided, that Section 342, I believe it is, provided that where no order was made with respect to a receiver, the debtor automatically remained in possession; that in his case, in the light of the State Court receivership I thought in all probability if a Chapter was filed, a receiver would be appointed whether we asked for it or not. He thought it was advisable to have a receiver.

I told him that the court, if we asked or if the

(Testimony of Ernest R. Utley.)

creditors asked, would probably appoint a receiver. I told him the provision. I read to him that provision for the appointment of a receiver. I think it is 333 or right in there somewhere. We discussed the question of the claims.

He said that he owed general unsecured creditors approximately \$111,000. He told me something of his secured obligations. I told him that the secured obligations would not be affected by a plan of arrangement unless the secured creditors consented to it; that those contracts would have to be carried out as contemplated in the contracts; that in order to secure a plan of arrangement he must have the consent of a majority in number and amount of unsecured creditors before the court would have jurisdiction to approve a plan of arrangement, but the court also must find that the plan was feasible and equitable and for the best interests of all parties concerned.

I told him that if the plan of arrangement was not approved under a Chapter XI proceeding there could be an adjudication. I discussed then what would follow in the event of an adjudication, that is, a liquidation of the estate or so much of it as necessary to pay off obligations, including administration expenses.

We discussed what the cost of the receivership would be. I read to him a portion of Section 48, I believe, of the Act—the section, anyway, that deals with receivers' fees. I told him the receivers would

(Testimony of Ernest R. Utley.)

probably have their own counsel and I told him—we discussed the question of claims, and I asked him if there were any taxes owing. He said there were not. I told him that we could anticipate tax claims being filed and, if they were filed, we would have an opportunity to appear and object to them and have a hearing on it; or, if any claims were filed that would not be properly allowable, the bankrupt or any interested party would have a right to appear and object to the claims.

All those matters—he wanted to know how long it would take. I told him that if it was a simple case where he had some \$3,500,000 in property, the selling of enough property to pay off \$111,000 in claims, and there were no other intervening legal problems, that should not take long.

He pressed me for a number of months and I said, “Well, I have been a referee in bankruptcy. I have closed some of those cases very hurriedly, where there were no complicated matters of litigation; other cases have dragged along for years, where there was a considerable litigation, and there is no definite way of determining that question. But we would endeavor to dispose of it as promptly as we could.”

The Court: I think I had better interrupt Mr. Utley for the noon recess.

Mr. Utley: I could finish in just a minute, I think, and I would like to, if I could.

The Court: Very well.



(Testimony of Ernest R. Utley.)

The Witness: I also told Mr. Bell that under Section 21A of the Bankruptcy Act they could put any person on the stand and examine them concerning the acts, conduct or property of the bankrupt. And I used the expression, I said, "We have often said that under that Section you can turn a person wrong side out and shake them." And I said, "You are not limited to the rules of evidence under 21A examination because the court is not determining any issue under those examinations."

(Tr. Page 90.)

I read numerous sections of the Act and of Chapter XI to Mr. Bell at the time. And he was quite anxious to know the religious views of the various courts and the religious views of the various referees and the religious views of the various prospective receivers. I told him what I knew of that.

He was very anxious to know that he would not be what he termed "persecuted". I told him that I thought he would receive fair and just treatment at the hands of the Federal Court anywhere he came in. I told him I thought, I believed then, and I still believe, that he would be better off under the jurisdiction of the Bankruptcy Court; he would have greater protection than he would under a State court receivership; and that I felt under the jurisdiction of the Bankruptcy Court, and I still believe, that the bankrupt would have a great deal more to say as to how the property was operated

(Testimony of Ernest R. Utley.)

and conducted, under the supervision of the Bankruptcy Court than he would under State court receivership.

I told him I thought that the bankruptcy proceeding would be less expensive than a State court receivership; that there would not be as great a liability or probability of a dissipation of the assets; that the bankruptcy court guarded the matter to a greater extent than did State court receiverships; that the trustee, or where there was a receiver, countersigned all checks and that they were careful to see that the money was legally expended.

There was quite a length conversation, our conversations leading up to the filing of the case, and there was a great deal said. That covers it briefly.

Mr. Hunt: Just one question, Judge. And then I will quit, your Honor.

Q. Did you discuss 21J with him relating to the calling of the party as an adverse witness as if upon cross examination?

A. I never mentioned, I don't believe, 21J, but I mentioned 21A extensively. I also discussed with him that provision of the various grounds upon which a discharge in bankruptcy could be denied, discussed with him the various problems that would confront us in getting a plan of arrangement approved, and the general operation of Chapter XI. I read many of the sections to him.

Mr. Hunt: Does your Honor want to adjourn now?

The Court: Yes. We will take the noon recess at this time until 2:00 o'clock. I will adjourn this hearing until 2:00 o'clock this afternoon. Court will be in recess until 1:30.

(Whereupon, an adjournment was taken until 2:00 o'clock p.m. of the same day, Friday, November 14, 1947.)

(Tr. Page 93)

Los Angeles, California, Friday, November 14,  
1947. 2:00 P.M.

Afternoon Session

ERNEST R. UTLEY—(Recalled)

The Court: You may proceed, Mr. Hunt.

Mr. Hunt: If your Honor please, I have completed my direct examination.

The Witness: There were one or two matters, may it please the court, in answer to Mr. Hunt's question that I overlooked this morning in my hurry to get through for the noon hour.

The Court: Would you like to amplify your answer?

The Witness: Yes. The question arose as to advice on adjudication and straight bankruptcy. The question arose as to adjudication when the discussion was had with respect to a Chapter proceeding, when I told Mr. Bell that an adjudication could be had in a Chapter case and discussed with him then, generally, what would happen in

(Testimony of Ernest R. Utley.)

the case of an adjudication, such as liquidation of assets or so much thereof as would be necessary to pay the obligations.

Then when the question arose later about filing a straight bankruptcy, about the only thing that was said then with reference to it was the fact that, even though there was an adjudication under Section 321 of the Act, a Chapter proceeding could subsequently be filed in a case where there had been an adjudication. And at that time there was not any further extensive discussion of what would happen in the event of an adjudication, inasmuch as it had been previously discussed.

(Tr. Page 94)

I also told Mr. Bell that the line of demarcation as to what belonged to the bankrupt estate was the date of the filing of the petition, and that all property owned by the corporation as of the date of the filing of the petition would be assets belonging to the bankrupt estate and would have to be turned over to the receiver or whoever was in charge of the bankruptcy estate; and that all property and records pertaining to property should be turned over to the bankruptcy receiver or receivers under Chapter proceedings.

Mr. Bell discussed with me with respect to the religious angle of the corporation, and I told him that the bankruptcy court was principally concerned with collecting the assets and paying the debts; and that I did not feel that the bankruptcy



(Testimony of Ernest R. Utley.)

court would be interested in affecting the rights of the members of the church or that they would try to affect their rights insofar as their religious worship was concerned; that the purpose of the bankruptcy court was to collect assets and pay debts, and that I did not feel that the members would be bothered in that respect.

The question arose as to whether or not they would be permitted to remain upon the property, and there was a lengthy discussion of that. And some of these members were running laundries, others were running hotels, and so forth; and I told him that quite frequently, if a case remained in Chapter proceedings, why, there was nothing that I could see that would prevent the operation of those properties by the members of the church; or, if the property was operated even after adjudication, I did not see anything that would change that rule, provided a receiver or trustee or the bankruptcy court would expect whoever worked upon those projects, whether it be a laundry or hotel, would have to do their work and do it as directed by the receiver and the bankruptcy court and would have to cooperate with the receiver and bankruptcy court.

(Tr. Page 95)

And there was a great deal more discussion. Mr. Bell asked many questions and they were answered. I don't know as I can remember all of

(Testimony of Ernest R. Utley.)

them, but generally that was the nature of the discussion with Mr. Bell and, to a lesser extent, these matters were briefly discussed with the other two members of the board of directors before the resolutions were passed, but very briefly. What extent Mr. Bell may have discussed it with them I do not know, but I mean in my presence.

It was discussed probably more with Mrs. Knapp than with Mrs. Nordskott, due to the fact that Mrs. Knapp was here and Mrs. Nordskott, a part of the time, was in San Francisco; but the major part of my discussion was with Mr. Bell.

(Tr. Page 96)

The Court: Any questions, Mr. Crittenden?

Mr. Crittenden: No questions, your Honor.

The Court: Any further testimony?

Mr. Hunt: If your Honor please, in the Petersen matter that was on the calendar for today Attorney Martin, who formerly represented the trustees, conducted the trial of that case before the Referee, and there is one short matter that should be created of record. I would like to take his testimony so that he can get away and attend to other business, if that is in order. He has been here all morning.

The Court: On the Petersen petition for review?

Mr. Hunt: Yes, your Honor.

(Proceedings on the Petersen petition for review omitted from this transcript.)

Mr. Crittenden: Your Honor, during the lunch hour there occurred to me there was one matter going to the question of discretion on that motion to set aside the adjudication on the grounds of religious persecution; there is very little prospect of the trustees paying any dividends, in view of the statement Mr. Hunt made to me several weeks ago that Governor Warren had written a letter to the Attorney General's office protesting any settlement on that tax matter, and now they were having difficulty even talking to any of the officials of the State in the tax matter; consequently the prospects of an early settlement in the tax matter or dividends was in the far and distant future.

The Court: All that adds up to—

Mr. Crittenden: It just adds to the discretion.

The Court: —that one of the creditors of the estate won't settle; isn't that the fact?

Mr. Crittenden: Well, I want to show the reason why, if that were necessary. A continued administration, therefore, would be in the discretion of the court to consider as to whether the administration should be terminated forthwith, and the rules I have cited in the memorandum of points and authorities, or whether it shall be permitted to run its course.

As to the points of law on this motion, I have covered it rather thoroughly in the memorandum. I could go over it again in oral argument if your Honor wishes. I do not think that would add anything to it.

The Court: I have no desire to hear a repetition of what is in the memorandum. I have read the memorandum.

I would like to hear you on these reviews if you have finished with the motion to vacate the adjudication.

Mr. Utley: May it please the court, if you are through with the motion, may I be excused?

(Tr. Page 98)

The Court: Yes, you may as far as the court is concerned. Is there any occasion to require Mr. Utley's further attendance?

Mr. Crittenden: No occasion.

The Court: And the bankrupt is not interested, I take it?

Mr. Utley: In the review the bankrupt is not a party.

The Court: The motion to vacate the order of adjudication is denied. Counsel for the trustees will prepare a formal order embodying this ruling under Local Rule 7.

Mr. Hunt: I do not believe the court has ruled on the offer of proof. Of course, I presume that is absorbed in the other.



The Court: I received all the evidence, everything that was offered. My ruling is based upon the assumption that the facts would be proved as offered, and upon the assumption they are true.

Mr. Hunt: Yes. Well, I presume that means that the offer of proof is denied.

Mr. Crittenden: I would duly note an exception.

The Court: No. I have accepted his offer of proof.

Mr. Hunt: Oh, I see.

The Court: I am assuming that the facts are true,

Mr. Hunt: Oh. I see.

(Tr. Page 99)

The Court: That the facts are true.

Mr. Hunt: I see.

The Court: For the purpose of this ruling.

Mr. Hunt: Yes.

The Court: And even so assuming, the motion would have to be denied.

Mr. Crittenden: I just asked your Honor to note an exception on that.

The Court: Yes; an exception will be noted to that ruling. But I want the record to be clear—I am glad you brought it up—that my ruling is predicated upon the assumption that all the facts stated in your offer of proof are true; and so

assuming, I would still be required and do deny the motion.

Mr. Crittenden: That is on the two grounds—one as to the discretionary power and the other as to the jurisdiction?

The Court: And the other as to the jurisdiction.

Mr. Crittenden: Including the question of stockholders' consent?

The Court: Yes, sir.

Mr. Crittenden: Or the members' consent?

The Court: Yes, sir. You will prepare a formal order within five days.

Mr. Hunt: I will, your Honor. I will follow the Rule, your Honor.

(Tr. Page 100)

Los Angeles, California, Friday, November 14,  
1947. 2:00 P.M.

Afternoon Session

Excerpt

The Court: Do you have anything, Mr. Hunt, that is not covered by your 29 page memorandum?

Mr. Hunt: Oh, I am not going to re-hash anything that I have got in my memorandum, but I want to cover some matters of fact which I think have been clearly mistaken by counsel.

The Court: I expect to read the record.

Mr. Hunt: Yes, I know. Well, just to clear this

up, your Honor, the plumbing supplies were sent to the Hanley Ranch in Jackson County, Oregon, remained there ever since, I think, September, 1945. The Hanley Ranch was an asset of this estate and came into the possession of this court on November 1, 1945 and has been in the possession of this court and its officers ever since; and the plumbing supplies remained there in possession of the bankruptcy receivers and trustees until sold sometime in September.

The Court: That covers the summary jurisdiction.

Mr. Hunt: Yes; that meets the question of summary jurisdiction.

The Court: But what do you say to the proposition that the dealings between the church and its members were presumptively fraudulent, the same as dealings between the trustee and the beneficiaries of the trust?

(Tr. Page 3a)

Mr. Hunt: Yes. If your Honor please, what they tried to do—I want to state right here and now that it is absolutely false that Referee Brink ever refused to receive any evidence that he considered relevant, competent and material. These parties have attempted, without doing it, to indirectly charge the church and Bell with fraud. They never came out and directly charged either one with fraud. There is nothing in the record to show that Patrick ever repudiated any of these

religious beliefs. The answers do not show that he completely severed himself from the church or he expects to do so in the future.

The Court: Does the answer charge fraud on the part of Bell?

Mr. Hunt: No, sir.

Mr. Crittenden: Well, now, let us read it.

Mr. Hunt: Just let me finish, please.

Here is what he has tried to do: Here he comes in here, trying to charge people with fraud, and yet in another proceeding that is going to come before your Honor in review, he represents Mr. Bell.

The Court: Who does?

Mr. Hunt: Mr. Crittenden. He has done that in San Francisco. He has gone in, representing Bell, and then the next day he comes in as a matter of practice or something like that and charges Bell with fraud.

(Tr. Page 4a)

Mr. Crittenden: Your Honor, I have a consent on that which I wish to file with the court, dated in November of '46, before I would take any of these matters either for him or others, he is subordinating his position to the position of the others. His primary concern was that of his religious freedom. I want to point here the last paragraph.

The Court: Do you have an extra copy of it?

Mr. Crittenden: Yes; I have, your Honor.



The Court: The clerk will mark this—

Mr. Crittenden: What is shown in the last paragraph—

The Court: Just a moment. Let us get our record straight. It will be marked as Petitioner Petersen's Exhibit 1 upon this review.

Mr. Hunt: Shall I proceed, your Honor?

Mr. Crittenden: I want to answer these charges against me as a lawyer.

The Court: Well, you say this document answers it.

Mr. Crittenden: I will read a paragraph in here and show you just what it says.

Mr. Hunt: May I proceed?

The Court: What else do you have, Mr. Hunt?

(Tr. Page 5-a)

Mr. Hunt: Now, then, on this fourth question, the record plainly shows that Mr. Patrick, after he turned these goods over to the church and they were in the church's possession, went to work on church projects, was active in the church.

The Court: That is all covered.

Mr. Hunt: That is all covered in the transcript. And remained on these projects, as far as I know, up to now, as far as the record shows, up to now. And I just call your attention briefly to this part of the record. On July 10, 1946, Patrick testified:

“Q. Now, after you had closed your business did you go on some project of the church?”

“A. I did.

“Q. Where did you go?”

“A. I want to the Palomarin Ranch.”

That is in this San Francisco area.

The Court: That is admitted. Mr. Crittenden said he went on the project.

Mr. Hunt: That is in the transcript, your Honor.

The Court: What do you say to the point that these transactions between the church and its members are presumptively fraudulent; that the burden is on the church to show good faith dealing with the members?

Mr. Hunt: If your Honor please, it is not alleged anywhere that the church was the basis. The allegation in the answer is that Mr. Bell was the basis. There is no charge that there is any fiduciary relationship between the church and Patrick, only between Bell and Patrick.

(Tr. Page 6-a)

The Court: What is the difference between Bell and the church?

Mr. Hunt: There may be none.

The Court: Isn't one the alter ego of the other?

Mr. Hunt: Well, I would not say that. The way it is conducted and operated, I would not say so;

but legally, I do not know. Mr. Bell is the dominant figure, of course.

The Court: I would not think there was much difference.

Mr. Hunt: Well, there may be none.

The Court: The fraud by Bell was the fraud of the church. The church operated through Bell. He was the sole trustee with the right of succession. If he appointed his successor in the presence of four or five notary publics, according to the by-laws, he was entitled to appoint his successor indefinitely.

Mr. Hunt: Well, maybe I can answer it this way, whether or not any fraud was committed by the church: There is no charge here, at least never answered, and the record does not show any, of fraudulent conduct on the part of the church. The whole thing is based upon the White decision and upon things that came out of this Mankind United movement.

(Tr. Page 7-a)

The Court: Would you contend that representations by Bell were not representations of the church?

Mr. Hunt: Oh, no, no.

The Court: If there was fraud on the part of Bell, there was fraud on the part of the church, wasn't there?

Mr. Hunt: The point is that the fraud on the

part of Bell was not properly pleaded. In other words—

The Court I have your point.

Mr. Hunt: Yes; that is my point. In other words, this man stood by there for months, knowing what these representations were, did nothing about it, never attempted to repudiate them, and only came in here. He did not directly charge Bell or the church with fraud, but he tried to stand in the shade of the White case, where there were different parties and different circumstances, and said, because in that case a referee held there was fraud and the facts there showed that these parties promptly severed all connection with the church and had nothing further to do with it, yet Patrick said, "Well, because that happened in that case, I am entitled to get my property back." Now, that is the sum and substance of all this argument up here.

The Court: There was nothing to prevent Patrick from saying, "I believe the doctrine of the church but I think Bell defrauded me or the church defrauded me," is there?

(Tr. Page 8-a)

Mr. Hunt: But he does not repudiate the doctrines. He is willing to accept them.

The Court: What difference does that make?

Mr. Hunt: The record shows that Patrick still



believes those doctrines in spite of anything that Bell or anybody said.

The Court: What difference does that make? He could still be defrauded by Bell, could he not?

Mr. Hunt: But anybody could condone fraud, your Honor; and if fraud is committed, you are not ipso facto to get your property back. You have go to show that you have cancelled and you want to quit. But if you condone it as to any false statements and do nothing about it, you have condoned the fraud. A man can't blow hot and cold at the same time, your Honor.

The Court: Would it be your position that the man would have to quit the church in order to rescind?

Mr. Hunt: I think he would have to quit the church in order to get his property back.

The Court: Renounce the beliefs of the church?

Mr. Hunt: Yes, sir. In other words, that is the very distinction between dissenters and loyalists.

Mr. Crittenden: That is right, your Honor.

The Court: I think that is too rough a distinction, myself.

(Tr. Page 9-a)

Mr. Crittenden: I do, too.

Mr. Hunt: It might be.

The Court: I do not see any inconsistency in a man saying that "I believe Bell is a scoundrel. He defrauded me. But I believe the church or the tenets of the church are sound and good and pure."

Is there any legal obstacle to his saying that?

Mr. Hunt: Well, but how could he be defrauded if he believes in the beliefs of the church in which Mr. Bell believes? That is the point.

One more thing, your Honor, that I think is conclusive in this case: Here is an affidavit in the record that was signed and verified by Patrick before a notary public prior to bankruptcy, about two weeks, and was introduced or was filed in the State court receivership. One of the points they make here is that Patrick was never a member of the church, therefore, his property did not pass to the church; it could not pass until he became a member. But here is what he says, without qualification, in this affidavit: "That your affiant is a member of Christ's Church of the Golden Rule."

The Court: Is that in the record?

Mr. Hunt: It is, your Honor.

The Court: I will see it.

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Excerpt from Peterson Transcript, June 12, 1946, 10 a.m.:

Tr. pg. 11, line 17: "The Referee: Well, the Petersen matter, part of it, I think may be settled pursuant to what I said yesterday. The trustees are impounding the current receipts from the Petersen restaurant. Now if that is going to continue, it is going to mean that the membership as a whole is going to have just that much less money to operate on. So I imagine the members themselves are going to have to submit the matter to Mr. Petersen, because if he still raises any question about the

ownership of this restaurant, it simply means we will have to [349] "continue to impound this money; and the members are the ones that are going to suffer by it. So I think I will put this matter, the Petersen matter, over until Tuesday, the 18th, to see what happens, to see what happens meanwhile."

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[Title of District Court and Cause.]

ORDER DENYING MOTION TO SET ASIDE  
ADJUDICATION

The motion of George D. Patrick and Mr. and Mrs. Peter Petersen to set aside the adjudication in bankruptcy made and entered herein on November 19, 1945, coming on regularly for hearing before this court the 14th day of November, 1947, Howard B. Crittenden, Jr., appearing as counsel for the proponents of the motion, and Reuben G. Hunt, of Grainger and Hunt, appearing as counsel for the Trustees in Bankruptcy herein, and no appearance being made on behalf of the bankrupt corporation,

And it appearing that the motion itself is unaccompanied by any supporting affidavits or other evidence, and that the said Trustees have filed herein their verified answer in opposition to the said motion, and that at the hearing of the motion, the proponents thereof did not present, or offer to present, any evidence in support of the motion

other than evidence relating to the alleged misunderstanding on the part of Arthur L. Bell, the President and a Director of the bankrupt corporation, of the nature and character of the bankruptcy proceedings and of the adjudication in bankruptcy herein, and an offer to prove alleged misconduct after the adjudication of the Trustees in Bankruptcy, and of the Referee in Bankruptcy to whom this case was referred by this court for [351] administration, and such offer to prove such alleged misconduct having been objected to by counsel for the Trustees in Bankruptcy, and such objection having been sustained by the court upon the ground that the facts offered to be proved, even if true, would be insufficient to justify the setting aside of the adjudication,

And testimony having been received by the court from both the proponents of the motion and the Trustees in Bankruptcy relative to the alleged misunderstanding on the part of Arthur L. Bell, the President and a Director of the bankrupt corporation, of the nature and character of the bankruptcy proceedings and of the adjudication in bankruptcy herein,

And the said motion having been submitted to the court for its decision,

The court hereby finds that:

~~1. The proponents of the said motion, and each of them, are not parties in interest with respect to said motion, in that they have not alleged or proved, or offered to prove, that they are creditors,~~



~~or officers, or directors, or members of the bankrupt corporation, which is a religious non-profit corporation organized and existing without stockholders, under the laws of the State of California, and particularly Secs. 593 to 603 of its Civil Code.~~

[Initial in margin: Mathes J.]

1. The records of this case, of which the court takes judicial notice, disclose that the proponents of the said motion, and each of them, have been aware of the pendency of this bankruptcy proceeding ever since its inception on November 1, 1945.

2. The records of this case, of which the court takes judicial notice, disclose that since November 1, 1945, in the course of the administration of the bankrupt's estate, over two million dollars have been received and disbursed by officers of this court, including primary and ancillary receivers, and trustees, that over thirty sales of real and personal property, involving hundreds of thousands of dollars and the payment of liens upon such properties [352] in large amounts have been consummated under the supervision of this court, that about twenty-seven petitions in reclamation of real and personal property from the possession of such officers of the court have been filed herein and either determined or are pending and that some reconveyances of real and personal property have been made to the original owners thereof by such officers of this court under its supervision; and that, under such circumstances, a setting aside of

the adjudication at this time, some two years after this bankruptcy proceeding was commenced and the adjudication made, would cause almost inextricable confusion with respect to the titles of such real and personal property and cause serious financial loss to many innocent persons.

3. The records of this case, of which the court takes judicial notice, disclose that the adjudication in bankruptcy herein is regular on its face, in that Christ's Church of the Golden Rule is a corporation subject to bankruptcy as a voluntary bankrupt under the provisions of the National Bankruptcy Act of 1898, as amended, and that it had its domicile, residence and principal place of business at Los Angeles, California, within the jurisdiction of the above entitled court, for the greater portion of the six months immediately preceding the commencement of the bankruptcy proceedings herein, and that the adjudication in bankruptcy was made herein upon the voluntary petition of the said corporation through its officers and directors, including the said Arthur L. Bell, its President.

4. The said Arthur L. Bell and the bankrupt corporation did, at and prior to the filing of the voluntary petition herein, fully misunderstand the nature and character of these bankruptcy proceedings and the said adjudication in bankruptcy, and were fully and correctly informed with respect thereto, prior to such adjudication, and prior to the

commencement of this bankruptcy proceeding by competent counsel. [353]

And the court having concluded, as a matter of law, from said findings of fact, that this court had jurisdiction to make the said adjudication and that the same is regular upon its face, and that the proponents of the said motion are not parties in interest herein with respect thereto and that, in any event, they [Initialed in margin: Mathes J.] are guilty of laches in presenting such motion to the court for its consideration,

It Is Hereby Ordered that the said motion be and the same is hereby denied.

Done in open court November 14, 1947.

/s/ WM. C. MATHES,  
District Judge.

Approved as to form, pursuant to Rule 7a of this court, this 1st day of December, 1947.

GRAINGER & HUNT,  
By Reuben G. Hunt,  
Attorneys for Trustees in Bankruptcy.

Judgment entered Dec. 29, 1947. Docketed Dec. 29, 1947. Book 47, Page 599. Edmund L. Smith, Clerk; by Louis J. Somers, Deputy.

(Affidavit of Service attached.)

[Endorsed]: Filed Dec. 29, 1947. [354]

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM ORDER DENY-  
ING MOTION TO SET ASIDE ADJUDICA-  
TION IN BANKRUPTCY

To the Honorable William Mathes, Judge of the  
Above Entitled Court:

Notice is hereby given that Mr. and Mrs. Peter Petersen and George Patrick hereby Appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the above-entitled Court in the above-entitled matter denying the motion of the said Mr. and Mrs. Peter Petersen and George Patrick to set aside the adjudication in bankruptcy in the above-entitled matter.

Dated: December 17, 1947.

/s/ HOWARD B. CRITTENDEN, JR.,  
Attorney for Mr. and Mrs. Peter Petersen and  
George Patrick.

(Acknowledgment by mail attached.)

[Endorsed]: Filed Dec. 29, 1947.





No. 11874

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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In the matter of

CHRIST'S CHURCH OF THE GOLDEN RULE, a California  
Non-Profit Religious Corporation,  
Bankrupt.

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PETER PETERSEN, MRS. PETER PETERSEN and GEORGE D.  
PATRICK,

*Appellants,*

*vs.*

PAUL W. SAMPSELL, L. BOTELER and MCINTYRE FARIES,  
as Trustees in Bankruptcy of the Estate of Christ's  
Church of the Golden Rule, Bankrupt, and CHRIST'S  
CHURCH OF THE GOLDEN RULE, BANKRUPT,

*Appellees.*

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APPELLEES' BRIEF.

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FILED

SEP 28 1948

MARTIN GENDEL,

810 James Oviatt Building, Los Angeles 14,

FRANK C. WELLER,

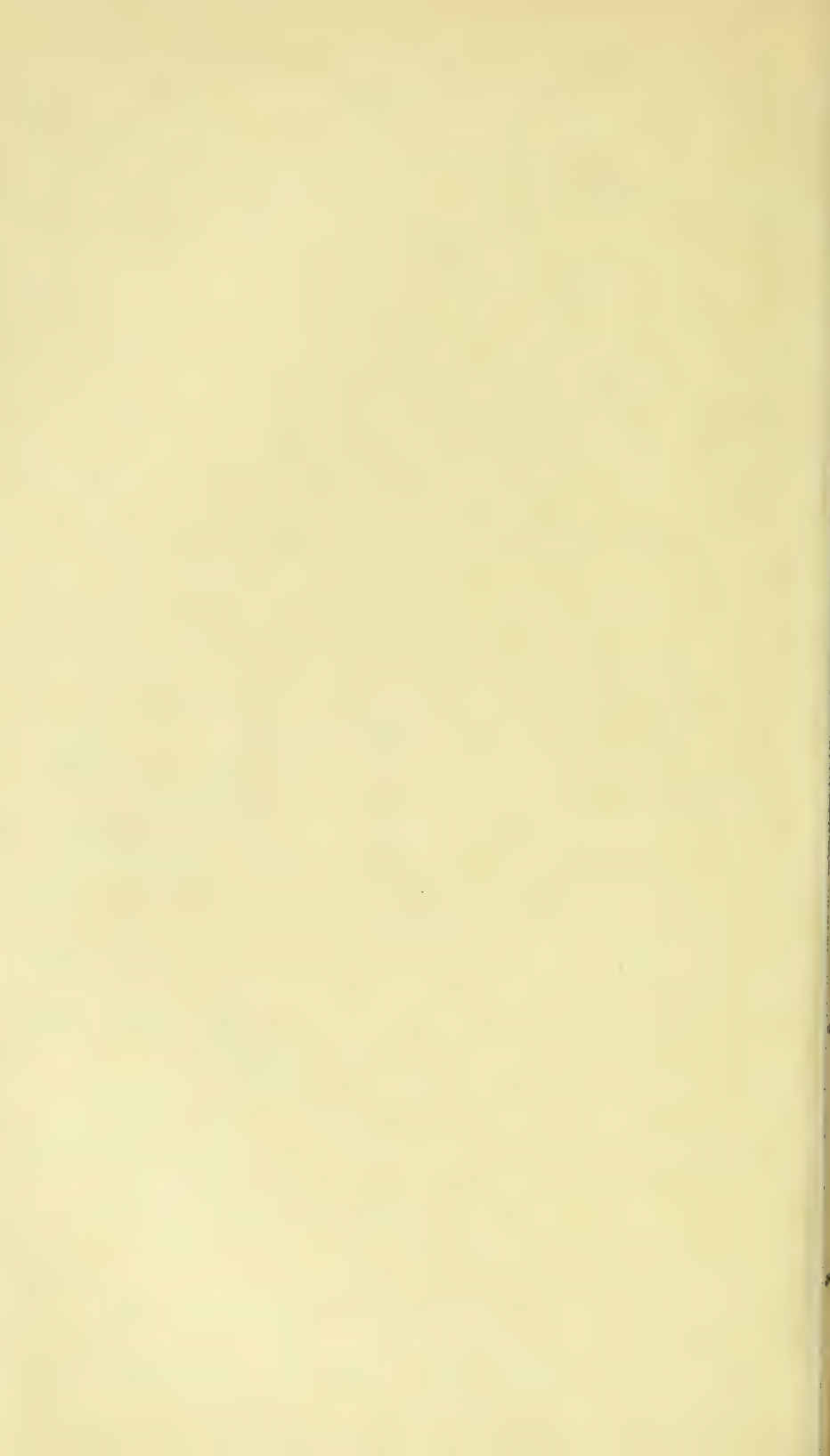
THOMAS S. TOBIN,

817 One Eleven West Seventh Street Building,  
Los Angeles 14,

*Counsel for Appellees, Trustees in Bankruptcy.*

PAUL P. O'BRIEN,

CLERK



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### I.

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No. 11874  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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In the matter of

CHRIST'S CHURCH OF THE GOLDEN RULE, a California  
Non-Profit Religious Corporation,

Bankrupt.

---

PETER PETERSEN, MRS. PETER PETERSEN and GEORGE D.  
PATRICK,

*Appellants,*

*vs.*

PAUL W. SAMPSELL, L. BOTELER and MCINTYRE FARIES,  
as Trustees in Bankruptcy of the Estate of Christ's  
Church of the Golden Rule, Bankrupt, and CHRIST'S  
CHURCH OF THE GOLDEN RULE, BANKRUPT,

*Appellees.*

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**APPELLEES' BRIEF.**

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*To the Honorable Judges of the United States Circuit  
Court of Appeals for the Ninth Circuit:*

Come now Paul W. Sampsell, L. Boteler, and McIntyre Faries, trustees in bankruptcy of the estate of Christ's Church of the Golden Rule, bankrupt, appellees herein, and in reply to the appellants' opening brief respectfully state as follows:

### Statement of the Case.

In order to properly present their argument in support of the ruling of the court below, appellees deem it necessary to include herein a separate statement of the facts involved on this appeal. A rather unusual situation exists in the present case with respect to the transcript of record. After appellants made a motion to exclude certain matters from the printed record, this court issued the following order:

“IT IS FURTHER ORDERED that counsel for appellants shall not be required to print the transcript of record in this cause; that counsel for respective parties shall print, as an appendix to their respective briefs those portions of the transcript of record on which they rely.” [Appellees’ Tr. 88.]

Subsequent to the entry of the foregoing order, pursuant to a stipulation of counsel, this court entered an order to the effect that in addition to those portions of the record which are printed by the appellants, and the appellees, respectively, and appended to their briefs, the court would consider the remaining documents and exhibits itemized in the designation of record of the appellants and in the counter-designation of the appellees, in their original form, without the necessity of the printing or other reproduction of said documents and exhibits. [Appellees’ Tr. 90-91.]

By reason of the foregoing, transcript references mentioned in this brief may relate to either the appendix to appellants’ brief (hereinafter referred to as “Appellants’ Tr.”), the appendix to this brief (hereinafter referred to as “Appellees’ Tr.”), or, to the original documents contained in the transcript certified to this court by the clerk of the court below (hereinafter referred to as “Tr.”).

The bankrupt, a California corporation, was incorporated as a non-profit corporation pursuant to the provisions of the General Non-Profit Corporation Law of the State of California.<sup>1</sup> [See Articles of Incorporation, Appellees' Tr. 5-14.] Neither the Articles, nor the By-Laws [Appellees' Tr. 14-32] of the bankrupt, make any provision for the issuance of stock or for stockholders. The Articles provide for not less than three directors, for the appointment of a trustee or trustees by the founder members. [Appellees' Tr. 12, 13.]

Sub-paragraph "p" of paragraph second of the Articles provides [Appellees' Tr. 11]:

"All by-laws, rules of procedure, appointment of officials and acts of any kind whatsoever, including the acts specified in the foregoing articles, by the officials, ministers, agents, representatives, associates or co-workers of this church organization pertaining in any way to the activities and/or interests of this corporation shall first be subject to the approval of the trustee or trustees which approval shall be expressed in writing and acknowledged before a notary public."

Paragraph Fifth of the Articles provides [Appellees' Tr. 12]:

"The Founder Members shall appoint a trustee or trustees who shall thereafter have the power to appoint his or their successor or successors in whatever manner he or they may select by agreement, will or otherwise, providing that the instrument by which said successor, trustee or trustees is or are appointed shall be acknowledged before a notary public."

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<sup>1</sup>Formerly Article 1 of Title XII of the Civil Code of the State of California (Sections 593 to 605(e) inclusive) and now contained in Sections 9000 to 9802 of the Corporations Code of the State of California.



The By-Laws of the bankrupt contain provisions governing membership in the church corporation. Section 1 of Article Two of the By-Laws contains the following provision with respect to the rights of members [Appellees' Tr. 15]:

"No member or official shall 'ever' have any personal, proprietary or legal right, title or interest in or to any properties, resources, assets or income of this Church; and it is specifically understood and agreed that whatever occupancy or use of Church property a member may be permitted to enjoy shall be subject solely to the discretion of its Board of Directors and trustee, or trustees—with no right of recourse of any kind whatsoever—and that upon a member's withdrawal, removal or decease, or upon demand of the Board of Directors and trustee, or trustees, all real or personal property in the possession of, or being used by, said member shall 'immediately' be relinquished to such member, or members, of this Church as may be authorized, in writing, to receive possession thereof by its Board of Directors and trustee, or trustees, in accordance with their own absolute discretion."

Section 1 of Article II of the By-Laws concludes as follows [Appellees' Tr. 17]:

"After January 20, 1945, all members of this Church shall—as rapidly as is practical and possible under its By-Laws and procedure—be trained to represent it as missionaries and/or ministers. When, in the judgment of the Board of Directors and the Trustee, or Trustees, they are deemed qualified, they shall be duly ordained as ministers of Christ's Church of the Golden Rule. Pending such formal ordination, each and every member of this Church, after January 20, 1945, shall be considered as a student of the

teachings of Christ Jesus (as understood and promulgated by this Church) preparing to minister unto mankind in the way that this Church believes will most clearly and accurately exemplify the essence and major purposes of Christ Jesus' life work and ministry."

Section 2 of Article II of the By-Laws sets forth the classifications of members. [Appellees' Tr. 18-21.] There are five classes of members, to-wit:

Founder Members,  
Advisory Members,  
Managing Members,  
Project Members,  
Initiate Members.

Section 2 of Article VI of the By-Laws sets forth the powers of the trustee, or trustees, as follows [Appellees' Tr. 28]:

"The trustee, or trustees, of the corporation shall have the full and complete power (subject to his, her, or their sole discretion) to approve or disapprove any and all actions of the Board of Directors or of the officers of the corporation, such approval or disapproval to be in writing over the signature of the trustee, or trustees, and to be acknowledged before a notary public. If any action be taken by the corporation, its officers or directors without first obtaining the express written approval of the trustee, or trustees, as hereinabove mentioned, such action shall be null and void unless subsequently ratified by the trustee, or trustees, in the same manner as his, her or their approval would have been given."

On November 1, 1945, the bankrupt corporation filed a petition under Chapter XI of the Bankruptcy Act [Ap-

pellants' Tr. 2-11]; attached to and made a part of said petition and marked Exhibit "A" thereto [Appellants' Tr. 11-13] was a property statement of the bankrupt showing property belonging to the estate at the purchase price value of \$2,956,110.50 with \$1,731,230.50 being the unpaid balance of principal on said properties, leaving a net property value of \$1,224,880.00; Exhibit "B" [Appellants' Tr. 14] to the aforesaid petition was a schedule of the unsecured creditors of the petitioner showing an indebtedness of \$364,650.00. Also attached to the aforesaid petition was a certified copy of the resolution of the corporation authorizing the filing of the petition. [Appellants' Tr. 10.]

At the same time the bankrupt petitioned for an order authorizing the filing of the petition for arrangement under Chapter XI without the filing of a schedule of assets and liabilities, and a statement of affairs [Tr. 2], the petitioners stated in paragraph II thereof that "the vast holdings and operations by said corporation throughout the states of California and Oregon" made it impossible to file a schedule of assets and liabilities immediately. In the petition for arrangement it was alleged [Appellants' Tr. 5] "That generally your petitioner's assets consist of office buildings, hotels, sanitariums, churches, ranches, laundries . . ." In addition to the foregoing type of properties, Exhibit "A" attached to the petition [Appellants' Tr. 11] showed that the assets of the estate included canneries, unimproved real estate, beach clubs, hotels, residences, apartments, stores, creameries, warehouses, parking lots, garages, saw mills, a cheese factory, a fish hatchery, cattle, automotive and farming equipment, growing crops, cars and trucks.<sup>2</sup>

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<sup>2</sup>For a more detailed description, see the second account and report of the trustee [Appellees' Tr. pp. 32-81].

Thereafter, on November 15, 1945, the bankrupt filed a request for and consent to adjudication in the Chapter XI proceeding [Tr. 19-22], and, on the same day, it filed, in the same proceeding, its voluntary petition in bankruptcy [Appellants' Tr. 15], along with various schedules of its assets and liabilities. [Tr. 43.] The summary sheet attached to the schedules showed assets of \$2,898,-460.58 and liabilities of \$2,177,925.45; however, no tax claims other than excise tax claims were scheduled.

Along with these petitions there was filed a certified copy of a resolution of the bankrupt corporation authorizing the filing of the aforesaid petitions. [Appellants' Tr. 18.] This resolution was signed by A. L. Bell, president, director and sole trustee of the corporation, and by A. E. Knapp, as secretary-treasurer, and by A. P. Nordskott as vice-president and director.

On November 19, 1945, Honorable William C. Mathes, Judge of the District Court, dismissed the bankrupt's plan of arrangement under the Chapter XI petition and adjudged it a bankrupt. [Appellants' Tr. 24.] Thereafter, the matter was duly referred to Referee Benno M. Brink as the referee in the within proceedings. [Appellants' Tr. 25.]

On November 19, 1945, J. Ray Files, Stewart McKee and Paul W. Sampsell were duly appointed receivers of the estate of the bankrupt. [Tr. 79.]

On January 4, 1946, Messrs. Paul W. Sampsell, L. Boteler, and Stewart McKee were duly elected by the majority of the voting creditors in both number and amount, and they qualified as the trustees in this proceeding. Subsequently, Stewart McKee resigned as trustee and was succeeded by McIntyre Faries. [Tr. 289.]

Thereafter the estate of the bankrupt was administered by the Bankruptcy Court through the aforesaid trustees,



which involved the commencement of ancillary proceedings in the Northern District of California [Tr. 94-96] and in the District of Oregon. [Tr. 85-86.] Extensive and protracted litigation has been carried on by and against the trustees in connection with the bankruptcy administration, and the estate is still being administered by the bankruptcy court. More than two million dollars have been received and disbursed by the trustees. [Appellees' Tr. 52.] The extensive properties of the bankrupt's estate have been operated, leased and/or sold under the supervision of the bankruptcy court. [Appellees' Tr. 38-44.] The appellants were aware of the pendency of the bankruptcy proceeding since its inception on November 1, 1945. [Appellants' Tr. 124.]<sup>3</sup>

On or about October 24, 1947, the appellants herein served upon the trustees a notice of motion to set aside the adjudication in bankruptcy, and indicated in said notice that the motion would be made and based upon the following grounds. [Appellants' Tr. 26-29.]

1. That the corporation was not a proper subject to be adjudicated a bankrupt.
2. That there was no proper authority or consent by the necessary corporate officers for the voluntary petition for adjudication.
3. That the consent to the voluntary petition for adjudication was obtained through the misunderstanding by the corporate officials of the nature of the proceedings to which they consented.

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<sup>3</sup>The Court below so found in its findings of fact contained in the order denying appellants' motion to set aside the adjudication, and, appellants have made no objection to this finding either in the court below or on appeal [Appellants' Tr. p. 124].

4. That the adjudication was somehow a violation of the United States Constitution as a result of the manner in which the estate was administered by the Bankruptcy Court and the trustees, subsequent to the order of adjudication.

A hearing was held on said motion before the Honorable William C. Mathes on November 14, 1947, and the moving parties, the appellants herein, made an offer of proof with respect to matters pertaining to the administration of the bankrupt's estate subsequent to the adjudication in bankruptcy. [Appellants' Tr. 44-81, 112.]

While the offer of proof was very lengthy, everything therein contained can be divided into two categories, the first being alleged religious persecution in connection with the bankruptcy administration, and secondly, misconduct of the trustees and other officers of the court as a part of the administration. The moving parties requested that the court take judicial notice, which it did, of all the records and prior proceedings in the case in connection with the motion.<sup>4</sup> In a written order dated November 14, 1947 [Appellants' Tr. 122-126], Judge Mathes denied the motion and made the following findings of fact:

1. That the moving parties had knowledge of the bankruptcy proceedings since their inception.

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<sup>4</sup>This was proper. In the case of *McDonough v. Owl Drug Co.* (C. A. A. 9th, 1935), 75 F. 2d 45, *cert. den.* 295 U. S. 750, this Court stated that it was proper for the trial court, in connection with a motion to vacate an adjudication on the ground of extrinsic fraud "to take judicial cognizance of the records and files of the bankruptcy proceeding in which the petition was filed. . . . Here the petition under review was filed by appellants in the bankruptcy proceeding, and it would be going far to say that, in exercising discretionary powers to protect itself against fraud, a court may not take judicial cognizance of the very proceedings in connection with which this action is invoked." (75 F. 2d at 51.)

2. That the administration was complicated, involving the receipt and disbursement of over two million dollars, and the sale of real and personal property with the result that a setting aside of the adjudication would cause "almost inextricable confusion with respect to the titles of such real and personal property and cause serious financial loss to many innocent persons."

3. That the adjudication followed the filing of a voluntary petition in bankruptcy which was regular on its face, and which contained all the essential jurisdictional allegations.

4. That the corporate officials who caused the petition to be filed fully understood the nature and character of the bankruptcy proceedings and the adjudication which followed.<sup>5</sup>

Upon the basis of these findings, the court concluded that it had jurisdiction to make the adjudication; that it was regular on its face; and, that the moving parties were guilty of laches in presenting their motion.

This appeal followed.

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<sup>5</sup>We should like to point out a typographical error contained on page 125 of the printed transcript appended to appellants' brief. Finding No. 4, should read:

"4. The said Arthur L. Bell and the bankrupt corporation did, at and prior to the filing of the voluntary petition herein, fully understand the nature and character of these bankruptcy proceedings and the said adjudication in bankruptcy, and were fully and correctly informed with respect thereto, prior to such adjudication, and prior to the commencement of this bankruptcy proceeding by competent counsel."

This error occurred by reason of the fact that an incorrect copy of the order was certified to this Court by the Clerk of the District Court, but that error has since been corrected by the Clerk of the District Court.

### Summary of Argument.

The ruling below should be affirmed on the following grounds:

1. The moving parties, the appellants herein, have shown no such legal interest or right of representation in the bankruptcy proceedings as would entitle them to any relief.

2. The bankrupt corporation was a proper subject to be adjudicated a voluntary bankrupt.

3. The voluntary petition in bankruptcy filed by the bankrupt corporation was regular on its face and was a proper and duly authorized act of the corporation.

4. The corporate officers who caused the voluntary petition to be filed, at and prior to the filing of the voluntary petition herein, fully understood the nature and character of bankruptcy proceedings and the adjudication that followed, and were fully and correctly informed by competent counsel with respect thereto prior to such adjudication and prior to the commencement of this bankruptcy proceeding.

5. The appellants, with full knowledge of the facts, acquiesced and participated in the bankruptcy proceedings from their inception for a period of approximately 2 years before making any objection to the regularity of the adjudication, and, have thereby been guilty of laches so as to preclude any possible right to the relief they seek.

6. Vacating and setting aside the order of adjudication is not the proper remedy for any alleged misconduct of the trustees or other officers of the Bankruptcy Court in the administration of the bankrupt estate subsequent to the order of adjudication.

7. The exercise of the power to vacate an adjudication rests in the sound discretion of the Bankruptcy Court, reviewable only for a clear abuse of that discretion; no abuse of discretion is shown in the present record.



I.

The Moving Parties, the Appellants Herein, Have Shown No Such Legal Interest or Right of Representation in the Bankruptcy Proceedings as Would Entitle Them to Any Relief.

There is nothing in the record to indicate that the appellants had any interest whatsoever in the bankruptcy proceedings either as members or creditors of the bankrupt corporation. While it is stated parenthetically on page 1 of appellants' opening brief that appellants are "individuals in the religious society" there is neither evidence nor allegation in the entire record to support this statement.<sup>6</sup>

The record before the court is voluminous, and nothing therein contained shows that the appellants have an interest in the bankruptcy proceedings, nor does appellants' brief contain any reference to any portions of the record showing any interest of the appellants<sup>7</sup>. In order to entitle any person to move the bankruptcy court for an order vacating and setting aside the adjudication in bankruptcy, the moving party must show some interest in the proceedings.

In the matter of *Fox West Coast Theatres*<sup>8</sup> (C. C. A. 9th, 1937), 88 F. 2d 212, 33 A. B. R. (N. S.) 471, *cert.*

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<sup>6</sup>The express provisions of the rules of this court are to the effect that the court will consider nothing but those parts of the record designated by counsel to be included in the printed transcript. Subsection 6 of Rule 19 of the Rules of the Circuit Court of Appeal for the 9th Circuit. See also: *Sampsell v. Anches*, C. C. A. 9th, 1939, 108 F. 2d 945, 42 A. B. R. (N. S.) 78.

<sup>7</sup>Subsections 2(b) and (f) of Rule 20 of the Rules of the Circuit Court of Appeals for the Ninth Circuit require such references.

<sup>8</sup>Cited on page 23 of Appellants' Opening Brief.

den. 301 U. S. 710, appellant had moved the bankruptcy court for an order vacating a voluntary adjudication in bankruptcy by a corporation, and, in affirming the lower court's denial of the motion, this court stated the following as one of the grounds for its decision:

"In order to invoke the extraordinary powers of a court of equity to vacate or ignore an order, because procured by extrinsic fraud, the party making the attack must show injury by the order. No such injury is shown." (88 F. 2d at 231.)

No argument we could make could so clearly state the principles involved as did the 8th Circuit Court of Appeals in the case of *Smith v. The Chase National Bank of the City of New York* (1936), 84 F. 2d 608, 31 A. B. R. (N. S.) 472.<sup>9</sup> In that case the appellants were bondholders of a holding company, whose subsidiaries had been voluntarily adjudicated bankrupts. The appellants took an appeal from the District Court's denial of their motion to set aside the adjudication of the subsidiaries. In affirming the trial court, the 8th Circuit Court of Appeals stated as follows (84 F. 2d at 613):

"It is necessary to decide whether the general rules of law upon which the appellants rely are here applicable. The Appellants are not, in any proper sense, parties to the bankruptcy proceedings. They are not creditors of the bankrupt, nor stockholders; nor have they any legal title or right to possession of the assets. They have no lien upon the assets by virtue of any contracts or dealings with the bankrupts. They are bondholders of General Theatres, which once owned a majority of the stock of Fox Film, which

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<sup>9</sup>Cited on page 23 of Appellants' Opening Brief.

in turn owned stock of Wesco, which owned the stock of the bankrupts and other subsidiary corporations. Appellants say that the Chase National Bank bore a fiduciary relation to the bondholders of General Theatres, and, wrongfully and in violation of its trust, acquired from it stock of Fox Film and thus became a constructive trustee for the appellants and other bondholders of the stock so improperly acquired; that the bank, by using this stock to control the affairs of Fox Film, and, through it, the affairs of its subsidiaries, even unto the third or fourth generation, for its own selfish advantage, has now become, as between itself and the bondholders, in equity, a trustee of the physical assets which underlie this pyramid of corporate structures; and that in this suit by the appellants, all corporate forms will be discarded, and the physical assets of the bankrupts and other similar subsidiaries treated as in the possession of the Chase National Bank as trustee for the bondholders of General Theatres. They assert that a part, at least, of these trust assets are in the custody of the court of bankruptcy by reason of the fact that the bank caused the bankrupts, who were two of its creatures, to file voluntary petitions, and that it then caused another of its creatures to buy up the claims of creditors and use them in purchasing the assets from the trustee in bankruptcy. According to the petitions, as we analyze them, the Chase National Bank, if the sales of the assets are completed, will have succeeded in passing the assets of the bankrupts, which, according to the allegation of the appellants' petitions, it in equity owned, controlled and held in trust for appellants and other bondholders, through the court of bankruptcy (thereby freeing such assets from the claims of creditors of the bankrupts for less than the claims were worth) to another corporation which it has created and owns

and controls. Hence, according to the petitions, the net effect of what the bank will have accomplished if the sales go through, will be about the equivalent of its having passed these assets from its right hand to its left hand. What the appellants seek by their petitions is an order or decree requiring the bank to pass the assets back to its right hand, or a decree that the bank hand them over to the bondholders of General Theatres to be applied on their bonds.

It would be difficult to imagine a controversy in which the court below would have less practical reason to be interested. For more than two years before the appellants' petitions were filed, it had been administering these assets, and, through its officers, conducting the extensive business of the bankrupts. It had collected their assets, and passed upon the claims of their creditors, all of which had been paid, purchased, or in some way satisfied by the time the appellants' petitions were filed. The title of the trustee in bankruptcy to the assets was marketable, so that the assets could be sold, and offers had been made for them, which the court determined should be accepted. The proceedings were about to be terminated, when these bondholders of General Theatres, a holding company—a sort of corporate parent twice removed from the bankrupts—filed their petitions. The controversy which they initiated was of no interest to the creditors of the estates or to the bankrupts, of no consequence to the trustee in bankruptcy, and certainly of no importance to the court so far as the administration of the estates in bankruptcy was concerned. The bankrupts, when the appellants' petitions were filed, were about to take their departure from the court through the exit, and no useful purpose would be served by forcing them to walk backwards and leave by the en-



trance. Many things had been done during the course of administration which could not be undone. Services had been rendered and expenses incurred by the officers of the court which had been paid for or were to be paid for out of these assets or by their purchaser, and the fraud alleged to have been perpetrated by the Chase National Bank upon the appellants did not and could not deprive the court of its jurisdiction of these estates or of its right to terminate these bankruptcy proceedings in the regular way if it saw fit to do so. An application to vacate an adjudication under such circumstances is clearly addressed to the discretion of the court of bankruptcy. *McDonough et al. v. Owl Drug Co. et al.* (C. C. A. 9th Cir.), 75 F. (2d) 45, 53, certiorari denied *McDonough et al. v. Owl Drug Co. et al.*, 295 U. S. 750; *Banco Commercial De Puerto Rico v. Hunter Benn & Co.* (C. C. A., 1st Cir.), 14 Am. B. R. (N. S.) 95, 31 F. (2d) 921; *Ewing et al. v. Forrester Nace Box Co. et al.* (C. C. A. 8th Cir.), 7 Am. B. R. (N. S.) 767, 12 F. (2d) 864; *In re De Lue* (C. C. A. 1st Cir.), 3 Am. B. R. (N. S.) 479, 295 F. 130, 132; *In re First National Bank of Belle Fourche et al.* (C. C. A. 8th Cir.), 18 Am. B. R. 265, 152 F. 64.

Assuming, without deciding, that appellants had a sufficient interest in the proceedings to ask that the adjudications be vacated, we are satisfied that, under the circumstances, the court was guilty of no abuse of discretion in refusing to entertain the petitions in so far as they sought to vacate the adjudications."

While in certain cases stockholders<sup>10</sup> of a bankrupt corporation, upon making a proper showing, may have an adjudication set aside, in the instant case there is nothing

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<sup>10</sup>See, for example:

*Zeitinger v. Hanardine-McKittrick Dry Goods Co.* (C. C. A. 8th), 244 Fed. 719, cert. den. 245 U. S. 667, 38 S. Ct. 64;  
*Hanna v. Bricton Mfg. Co.* (C. C. A. 8th), 62 F. 2d 139;  
*McDonough v. Owl Drug Co.* (C. C. A. 9th), 75 F. 2d 45, cert. den. 295 U. S. 750, 55 S. Ct. 829.

This Court, in the case of *McDonough v. Owl Drug Co.* (C. C. A. 9th 1935), 75 F. 2d 45, made it clear that the right of stockholders to have an adjudication set aside is subordinate to the rights of creditors in a bankruptcy proceeding. In that case preferred stockholders sought to have a voluntary adjudication in bankruptcy of the corporation vacated seventeen months after the adjudication and five months after the bankrupt's property had been sold in a bankruptcy liquidation sale. The ground upon which the motion to vacate the adjudication was based was that extrinsic fraud had been committed by certain stockholders of the bankrupt corporation, which was a fraud on the bankruptcy court. In affirming the district court's denial of the motion, this court stated (75 F. 2d at 52):

"No creditor of the bankrupt has joined with appellants in seeking to have the adjudication of bankruptcy annulled, but on the contrary the trustee, conceiving that it is primarily his duty to protect the rights of creditors, is vigorously opposing the setting aside of the adjudication. It may be granted that preferred stockholders of a corporation are competent to file a petition in a bankruptcy proceeding attacking an order adjudging such corporation a bankrupt on the ground that such order was procured by fraud and imposition, and may in that manner invoke the incidental equity powers of a court of bankruptcy in the premises. Such a challenge, however, must be based upon such grounds as will appeal to the conscience of a chancellor and must be seasonably interposed. . . . Let it not be forgotten that in liquidating a bankrupt corporation the rights of creditors come first. The interest of corporate stockholders in such proceedings are always secondary and subordinate to the interests of the corporate creditors. . . . No creditor is complaining. No creditor has manifested any dissatisfaction with the adjudication, nor with the steps which have been taken in liquidating the estate. . . . In these circumstances it would be inequitable, unconscionable, and unjust to subject the creditors to the evils and hazards which the cancellation of the adjudication would unavoidably entail. The creditors of the bankrupt corporation are not involved in the fraud upon which appellants rely."

in the record to reveal any interest of the appellants in the bankruptcy proceedings other than the irrelevant statement in their brief, *dehors* the record, that they are "individuals in the religious society." Upon this ground alone the ruling below should be affirmed.

## II.

### The Bankrupt Corporation Was a Proper Subject to Be Adjudicated a Voluntary Bankrupt

In the present case the adjudication followed the filing of a voluntary petition by the corporation. As stated by this court in the matter of *Fox West Coast Theatres* (C. C. A. 9th, 1937), 88 F. 2d 212, 33 A. B. R. (N. S.) 471, *cert. den.* 295 U. S. 750:

"Before considering appellants' contentions in detail, it should be stated that the adjudication of bankruptcy necessarily and properly resulted from the filing of the petition in bankruptcy. The property of the bankrupt was rightfully in the possession of the bankruptcy court and the filing of the voluntary petition was authorized by the bankrupt. We have already pointed out that although the alleged purpose of the conspiracy was to make the bankrupt appear insolvent, appellants now concede, as they must, that it is not necessary for a voluntary bankrupt to be insolvent in order to take advantage of the provisions of the Bankruptcy Act. It should further be observed that although appellants charge that the bankrupt and its stockholders 'conspired' or agreed with one another to take advantage of the provisions of the Bankruptcy Act, such an agreement is lawful." (88 F. 2d at 221.)

It should be noted at the outset that the adjudication herein was based upon a voluntary petition. The Bank-

ruptcy Act (11 U. S. C. A. Section 22), clearly sets forth the qualifications for becoming a bankrupt. Thus Section 4(a) provides "any person, except a municipal, railroad, insurance, or banking corporation, or a building and loan association, shall be entitled to the benefits of this Act as a voluntary bankrupt." Subsection (b) of the same section limits the persons who may become involuntary bankrupts to "any natural person" or "commercial corporation." A mere reading of these two sections reveals the significance of the omission of any limitation, other than the express exceptions, on the persons who may become voluntary bankrupts. Subsection 23 of Section 1 of the Bankruptcy Act (11 U. S. C. A. 1) defines persons as including "corporations" except where otherwise specified. Accordingly, the word "person" as used in Section 4(a) includes corporations, and the cases have held that corporations of every kind except those expressly excluded, regardless of their purposes or the laws under which they were incorporated, are entitled to become voluntary bankrupts. Thus, in the matter of *Carthage Lodge* (D. C. N. Y., 1916), 230 Fed. 694, 36 A. B. R. 873, the court made the following analysis of the foregoing statutory provisions,<sup>11</sup> in holding that the Independent Order of

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<sup>11</sup>While the Bankruptcy Act has been amended since that decision, there was no change whatsoever in the section there construed. That section then read:

"Any person except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt."

The present section and the one involved on this appeal is exactly the same, except there has been added to the exceptions the following language:

"or, a building and loan association."

Moreover, the word "persons" and the word "corporations" (Comp. St. 1913, Sec. 9585) were defined in the statute there being construed in the identical language as those terms are defined in the present statute (Section 1(8) (23) 11 U. S. C. A. 1).



Odd Fellows, a fraternal organization, could become a voluntary bankrupt (230 Fed. at 698):

“It is clear, therefore, that *any corporation or partnership* is entitled to the benefits of the act, and may file a voluntary petition in bankruptcy, except a ‘municipal, railroad, insurance or banking corporation.’ The Bankruptcy Act of 1867, as to those entitled to the benefits of the act, was narrower than is the act of 1898, as amended in 1910, as that act of 1867 limited the benefits of the act in case of voluntary bankrupts to ‘moneyed, business, or commercial corporations.’ The corporations entitled to the benefits of the act of 1898 as voluntary bankrupts are not limited to moneyed, business or commercial corporations. Municipal, railroad, insurance, and banking corporations only are excluded from the benefits of the act of 1898, as amended, as *voluntary* bankrupts. When we come to subdivision ‘b’ of section 4, we find that *only* moneyed, business, or commercial corporations, excepting therefrom municipal, railroad, insurance and banking corporations, may be proceeded against in *involuntary* bankruptcy.

The question then is: Is the Carthage Lodge, No. 365, Independent Order of Odd Fellows of Carthage, N. Y., a person or corporation within the meaning of said Bankruptcy Act? Such lodge certainly has some of ‘the powers and privileges of private corporations not possessed by individuals or partnerships.’ It is a creation of the statutes of the State of New York. Its purposes, generally speaking, are benevolent or charitable in character. It has power to elect trustees to manage its affairs. These trustees may take, hold, and convey, under its direction, all the temporalities and property belonging to it, whether real or personal, and may sue for and recover, hold and enjoy same in whatsoever manner the same may have been acquired,

and may demise, lease, and improve all such property, real or personal. These trustees hold for the lodge, and are subject to its directions. It may make rules and regulations for managing its temporal affairs and for the disposition of its property, etc. There is no express power to incur debts generally, but this power for corporate purposes is plainly implied, and its property is liable for the payment of such debts."

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"Indeed, if a business, a moneyed, a trading, or a manufacturing institution organized under and pursuant to the laws of the State and owning property and owing debts is entitled to the benefits of the Bankruptcy Act, it is difficult to understand why an educational, beneficial, fraternal, or charitable institution organized under the laws of the same State and owning property and owing debts lawfully contracted may not have the benefits of the act. Certainly it is no more in the interest of the general public that the one have the benefits of the act than that the other have. Why should the latter class of corporations mentioned be ruined and driven out of business by the burden of their debts, while the business, commercial, manufacturing, and moneyed corporations are permitted to take the benefits of the Bankruptcy Act and start business anew? I do not think Congress intended any such differentiation, and I am not aware of any rule of public policy which requires a construction of the Bankruptcy Act different from the one I am giving it. In fact I am unable to see that the statute is at all equivocal.

"Within section 4a, read with section 1(6) and section 1(19), all corporations are persons, and within the purview of the act, except municipal, railroad, insurance, and banking corporations, and entitled to

the benefits of the act as voluntary bankrupts, and, as stated, the law does not concern itself with the nomenclature in the statute creating such corporations. If it did, a lodge of Odd Fellows created under the laws of Massachusetts would be entitled to the benefits of the act, if there called 'a corporation,' while such a lodge, with exactly the same powers and privileges, would not be if created under a precisely similar statute of Pennsylvania, if in such statute called a beneficial association or by some other name."

A similar result was reached in the *Matter of Philadelphia Consistory Sublime Princes Royal Secret 32 Degree Ancient Accepted Scottish Rite* (U. S. D. C. Penna. 1941), 40 Fed. Supp. 645, 53 A. B. R. (N. S.) 374, where the court wrote a scholarly opinion in holding that "an unincorporated beneficial association," whose function was to give "various funds, aid and support to those of its members and members' families" who were in need, was a proper subject to be adjudicated a voluntary bankrupt. There are numerous cases in accord.<sup>12</sup>

In the present case the bankrupt was a corporation duly organized and existing under and by virtue of the general

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<sup>12</sup>*Matter of S. & F. Mfg. Sales Co.* (D. C., Ohio), 246 Fed. 1005, 39 A. B. R. 783; *Matter of Elmsford Country Club* (D. C. N. Y.), 50 F. 2d 238, 17 A. B. R. (N. S.) 558 (a country club); *Matter of Grand Lodge Ancient Order of United Workmen* (D. C. Cal.), 232 Fed. 199, 36 A. B. R. 634 (Benevolent Order); *Matter of Michigan Sanitarium & Benevolent Association* (D. C. Mich.), 20 Fed. Supp. 979, 36 A. B. R. (N. S.) 627 (Benevolent Order); *In re Prudence Co. Inc.* (D. C. N. Y.), 27 A. B. R. (N. S.) 471, 10 Fed. Supp. 33, affirmed (C. C. A. 2d), 29 A. B. R. (N. S.) 549, 79 F. 2d 77, cert. denied 296 U. S. 646; *Hoile v. Unity Life Insurance Co.* (C. C. A. 4th, 1943), 53 A. B. R. (N. S.) 37, 136 F. 2d 133.

See also:

1 Collier on Bankruptcy (14th Ed.), pages 583 to 587.

non-profit corporation law of the state of California. The record discloses that the bankrupt was engaged in numerous and various business activities. The bankrupt owned and operated office buildings, dairies, laundries, lumber mills, restaurants, hotels, shops, garages and numerous other ordinary commercial activities. These activities were expressly authorized by the bankrupt's Articles of Incorporation,<sup>13</sup> and were in accordance with the California law governing nonprofit corporations. In Section 9200 of the Corporations Code of the State of California<sup>14</sup> under which the bankrupt herein was incorporated, it is provided:

“ . . . carrying on business at a profit as an incident to the main purposes of the corporation and the distribution of assets to members on dissolution are not forbidden to nonprofit corporations.”<sup>15</sup>

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<sup>13</sup>See paragraph Second, subsections “f”, “h”, “i”, “k”, “n” and “o” of Articles of Incorporation of the bankrupt [Appellees' Tr. pp. 8-11].

<sup>14</sup>Formerly Section 593 of the Civil Code of the State of California.

<sup>15</sup>See also Section 9501 of the Corporations Code of the State of California (formerly Civil Code Section 593) providing as follows:

“Every nonprofit corporation may:

- (a) Sue and be sued.
- (b) Make contracts.
- (c) Receive property by devise or bequest, subject to the laws regulating the transfer of property by will, and otherwise acquire and hold all property, real or personal, including shares of stock, bonds, and securities of other corporations.
- (d) Act as trustee under any trust incidental to the principal objects of the corporation, and receive, hold, administer, and expend funds and property subject to such trust.
- (e) Convey, exchange, lease, mortgage, encumber, transfer upon trust, or otherwise dispose of all property, real or personal.
- (f) Borrow money, contract debts, and issue bonds, notes, and debentures, and secure the payment or performance of its obligations.
- (g) Do all other acts necessary or expedient for the administration of the affairs and attainment of the purposes of the corporation.”



On the basis of the numerous commercial activities carried on by the bankrupt corporation involuntary proceedings in bankruptcy might have been instituted against it. *Matter of Roumanian Workers Educational Association of America* (C. C. A. 6th, 1940), 108 F. 2d 782, 42 A. B. R. (N. S.) 34.<sup>16</sup>

The Supreme Court of California has recognized that religious non-profit corporations are amenable to suit and to other obligations of ordinary commercial corporations with respect to any of their secular activities. Certainly persons dealing with any of the numerous business enterprises carried on by the bankrupt could not be precluded from any remedy for breaches of any business obligations by the Church corporation.

In *Roman Catholic Archbishop of San Francisco v. Industrial Accident Commission* (1924), 194 Cal. 660, the court affirmed an award of the Industrial Accident Commission in favor of a carpenter and against the *Roman Catholic Archbishop of San Francisco*, a corporation sole, for whom the carpenter had performed labor in the course

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<sup>16</sup>In that case the Court affirmed a denial of a motion to vacate an involuntary adjudication of a Michigan non-profit corporation which had been organized "for the propagation of Socialism among the Roumanian workers of the country." The evidence showed that the corporation was engaged in extensive activities of a commercial and business nature. The court held that non-profit corporations, not being expressly excluded from the operation of Section 4(b) of the Act, where they engaged in commercial activities could be adjudicated an involuntary bankrupt, and that the corporation was "a business and commercial corporation within the purview" of the Act.

of which he was injured. In reaching this conclusion the court uses the following language, which is particularly appropriate to the instant case (194 Cal. at 677):

“Courts will take judicial notice of the existence of private corporations created by public law. (15 R. C. L. 1117; 11 Fletcher on Private Corporations, 584-587; Civ. Code, titl. XII, secs. 593-602.) A corporation formed under title XII of the Civil Code has civil rights and duties and its powers, like those of other corporations, are construed with reference to the object of the corporate existence. (*Harriman v. Church*, 63 Ga. 186 (36 Am. Rep. 117).) Section 602 of the Civil Code provides, in part: ‘Whenever the rules, regulations, or discipline of any religious denomination, society, or church so require, for the administration of the temporalities thereof, and the management of the estate and property thereof, it shall be lawful for the bishop . . . to become a sole corporation, in the manner prescribed in this title, as nearly as may be, and with all the powers and duties, and for the uses and purposes in this title provided for religious incorporations. . . . Every corporation sole shall, however, for the purposes of the trust, have power to contract in the same manner and to the same extent as a natural person, and may sue and be sued, . . . and shall have authority . . . to buy . . . and in every way deal in real and personal property in the same manner that a natural person may . . .’ Such powers are entirely distinct from the spiritual side of the church, and in order that a religious society be recognized by law it must be shown that it is capable of making contracts, accepting benefits, and of suing and being sued. (*Baxter v. McDonnell*, 155 N. Y. 83 (40 L. R. A. 670, 49 N. E. 667.)”

III.

**The Voluntary Petition in Bankruptcy Filed by the Bankrupt Corporation Was Regular on Its Face and Was a Proper and Duly Authorized Act of the Corporation.**

A certified copy of the resolution of the Board of Directors of the bankrupt corporation was filed with the voluntary petition in bankruptcy. The resolution authorized the filing on behalf of the corporation of a voluntary petition in bankruptcy with a request that an adjudication in bankruptcy be had. [Appellants' Tr. 19.] The certificate attached to the resolution certified that it was adopted by the Board of Directors of the corporation at a duly and regularly called and held meeting of said directors and that said resolution appears in the minutes of the meeting and had never been revoked or modified. The certificate was signed by A. L. Bell as President, Sole Trustee and Director, A. E. Knapp as Secretary-Treasurer of the corporation, and A. P. Nordskott as Vice-President and Director.

The petition and the resolution were in strict compliance with the law of the State of California and the articles and by-laws of the bankrupt. Thus, in Section 9500 of the Corporations Code of the State of California<sup>17</sup> it is provided:

“Except as otherwise provided by the Articles of Incorporation or the by-laws, the powers of a non-profit corporation shall be exercised, its property controlled, and its affairs conducted, by a board of not less than three directors.”

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<sup>17</sup>Formerly Section 593 of the Civil Code of the State of California.

The articles of the bankrupt [paragraph Fourth thereof, Appellees' Tr. 11] call for a board of directors of not less than three persons.

Subsection "p" of paragraph Second of the Articles provides that all acts of the corporation by any officials thereof "shall first be subject to the approval of the trustee or trustees." [Appellees' Tr. 11.] Article 5, Section 1 of the by-laws of the bankrupt provides:

"All corporate powers shall be exercised by, or under the authority of, and the business affairs of the corporation shall be controlled by, the board of directors; provided, however, that the board of directors shall not legally obligate the church by the sale, hypothecation, or encumbering of any of the real or personal property or income or other resources of the church . . . without first obtaining the express approval of the trustee or trustees. . . ."

In the instant case Mr. A. L. Bell was the sole trustee. He signed the voluntary petition in bankruptcy [Appellants' Tr. 16] and signed the certificate attached to the resolution of the board authorizing the filing of the petition in bankruptcy, as President, Director and Sole Trustee. [Appellants' Tr. 20.] There is nothing in the record, or in the laws of the State of California or of the United States requiring the consent of any other persons.

Appellants argue, however, that the proper consent of the corporation was not obtained, and apparently rely upon the following provisions of the Corporations Code of the State of California:

Section 9800 of the Corporations Code of the State of California provides that:

"A non-profit corporation may dispose of all or substantially all of its assets, or may be wound up or



dissolved, or both, in the same manner and which the same effect as a stock corporation, under the General Corporation Law.”

Section 3901 of the Corporations Code provides that:

“A corporation shall not sell, lease, convey, exchange, transfer, or otherwise dispose of all or substantially all of its property and assets except in accordance with one of the following subdivisions:

. . .

(b) Under authority of a resolution of its board of directors and with the approval of the principal terms of the transaction and the nature and amount of the consideration by vote or written consent of shareholders entitled to exercise a majority of the voting power of the corporation.

However, the articles may require for such approval the vote or consent of a larger proportion of the shareholders, or the separate vote of a majority or a larger proportion of any class or classes of shareholders.”

Although, as we shall hereinafter demonstrate, this section can have no application to a voluntary petition in bankruptcy, in any event the appellants herein have shown no such interest in the proceeding as to have any right to complain of any alleged lack of compliance with the above mentioned code sections. The California Courts have construed this code section as giving a right to complain only to stockholders and perhaps to creditors.<sup>18</sup>

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<sup>18</sup>*Gunther v. Thompson* (1931), 211 Cal. 631;

*Lost Burros Gold Mining Co. v. Inyo County Bank* (1927), 83 Cal. App. 679.

The United States Supreme Court has unequivocally held, however, that such a code section has no application to the filing of a petition in bankruptcy. In the case of *Royal Indemnity Co. v. American Bond & Mortgage Co.* (1933), 289 U. S. 165, 53 S. Ct. 551, 22 A. B. R. N. S. 590, the Supreme Court stated the question before it as follows:

“Have creditors standing to ask the vacation of an adjudication based on a petition filed by authority of the directors of the bankrupt [a Maine corporation], where a statute of the state of incorporation forbids transfer, except in the usual course of business, of the franchises or assets of the company, without stockholders’ assent?” (289 U. S. at 166.)

In answering the question in the negative and affirming the lower court’s denial of the creditors’ motion to vacate the adjudication, the court states as follows:

“Second: The revised Statutes of Maine, chap. 56, under the caption ‘Rights of Minority Stockholders,’ enact:

‘Sec. 63. Corporations not to sell franchises or entire property without consent of stockholders. No corporation shall sell, lease, consolidate or in any manner part with its franchises, or its entire property, or any of its property, corporate rights or privileges essential to the conduct of its corporate business and purposes, otherwise than in the ordinary and usual course of its business, except with the consent of its stockholders at an annual or special meeting, the call

for which shall give notice of the proposed sale, lease or consolidation. All such sales, leases and consolidations shall be subject to the provisions of this and the eleven following sections, and to the prior lien of stockholders as therein defined.'

After providing that the act shall not apply to mortgages of corporate property, the sections following regulate methods of effecting consolidations, the valuation and payment for the stock of dissenting minority stockholders, etc. We are told that this statute prohibits the filing of a voluntary petition in bankruptcy by authority of a resolution of the board of directors, and that a shareholders' vote is required to authorize such action. No case decided by the Maine courts is cited in support of this assertion. But it is said that the filing of such a petition is a conveyance of all of the corporate property, and so plainly within the statutory prohibition. We cannot agree. The petition in a voluntary or involuntary proceeding is a pleading. The entry of an adjudication vests title in the trustee, and this is the act of the court, not of the petitioner. Moreover, it seems too plain to need elaboration that the statute does not in terms effect the initiation of a bankruptcy proceeding, and was passed for a wholly different purpose." (289 U. S. at 170.)

It will be noted that the Maine statute, which was before the Supreme Court, is substantially the same as the California statute. There can be no doubt that the decision of the Supreme Court is determinative of the

question raised by appellants herein as to the propriety of the resolution authorizing the filing of the voluntary petition.

Throughout appellants' opening brief, mention is made of the fact that the bankrupt was not insolvent at the time of the filing of the petition.<sup>19</sup> Insolvency is not a necessary prerequisite to an adjudication in bankruptcy on a voluntary petition, and this Court has squarely so held in the *Matter of Fox West Coast Theatres* (C. C. A. 9th, 1937), 88 F. 2d 212, *cert den.* 301 U. S. 710. In that decision this Court quotes with approval the following statement from *Remington on Bankruptcy*, Section 48, page 88:

"Insolvency not requisite to voluntary bankrupt.—Nor is it necessary that he (the petitioner) be insolvent. The reason of this is probably that, if he be solvent, it is nobody's business but his own if he chooses to have his creditors paid through the machinery of the bankruptcy court; and if on the other hand he be actually insolvent, why then he ought to go into bankruptcy."<sup>20</sup> (88 F. 2d at 218.)

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<sup>19</sup>While the schedules originally filed in the bankruptcy proceeding by the bankrupt did not show insolvency, it should be noted that none of the schedules included state and federal tax claims (other than excise taxes) and alleged labor claims which were subsequently filed and which, if allowed, will result in insolvency. See Second Account and Report of Trustees [Appellees' Tr. p. 45].

<sup>20</sup>Accord: *Peoples National Bank v. Feltz* (C. C. A. 6th, 1928), 25 F. 2d 295, 12 A. B. R. (N. S.) 109.



IV.

The Corporate Officers Who Caused the Voluntary Petition to Be Filed, at and Prior to the Filing of the Voluntary Petition Herein, Fully Understood the Nature and Character of Bankruptcy Proceedings and the Adjudication That Followed, and Were Fully and Correctly Informed by Competent Counsel With Respect Thereto Prior to Such Adjudication and Prior to the Commencement of This Bankruptcy Proceeding.

On the basis of the undisputed facts in the record there can be no doubt that the corporate officials of the bankrupt were fully informed as to the nature of bankruptcy proceedings. The testimony of Ernest R. Utley, one of the attorneys for the bankrupt, conclusively demonstrates that they were fully advised by their counsel as to all of the ramifications of the bankruptcy proceedings and jurisdiction. In Mr. Utley's testimony he stated that he had been admitted to practice before the federal court since 1920 and that from 1936 until March of 1945 he had been a Referee in Bankruptcy; that he had numerous and extensive discussions pertaining to the notice of bankruptcy proceedings with Mr. Bell, the president and sole trustee of the bankrupt, and with Mrs. Knapp and Mrs. Nordskott, officers and directors of the bankrupt corporation who signed the voluntary petition. [Appellants' Tr. 99-109.]<sup>21</sup>

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<sup>21</sup>See also the testimony of Arthur L. Bell, President, Director and Sole Trustee of the bankrupt corporation, contained in Appellants' Tr. pp. 81 to 97.

Regardless of the understanding of the corporate officials who caused the voluntary petition to be filed, no contention has been made, nor could any such contention be made, that the petition was not regular on its face, and any understanding which the corporate officials might have had with respect to the nature of their acts is no ground whatsoever to vacate the adjudication. As stated by this Court in *Matter of Fox West Coast Theatres* (88 F. 2d 212 at 230) :

“There was no allegation of extrinsic fraud. Consequently, there was no jurisdiction in the bankruptcy court to vacate its order of adjudication even if extrinsic fraud would justify such action. Second, the order of adjudication of bankruptcy followed as a matter of course upon the application therefor by the bankrupt. Consequently, no ground is alleged for the vacation of the order.”

This Court had occasion to state the grounds upon which an adjudication in bankruptcy can be vacated in the *Matter of Larsen* (C. C. A. 9th, 1941), 124 F. 2d 121 at 122, 47 A. B. R. N. S. 787, where the court stated :

“Having become final before appellants’ petition was filed, the order of adjudication could be vacated only (1) for lack of jurisdiction, or (2) for extrinsic fraud. *In re Fox West Coast Theatres* (C. C. A. 9th Cir.), 33 A. B. R. N. S. 471, 88 F. (2d) 212, 221, 222.

There was no lack of jurisdiction. Appellant was a person subject to being adjudged an involuntary

bankrupt. The involuntary petition alleged facts which warranted adjudication.”

In a recent decision of the Third Circuit Court of Appeals (*In re Technical Marine Maintenance Co., Inc.* (1948), C. C. H. Bankruptcy Service, par. 562.41), certain creditors of a corporation filed an involuntary petition against it under Chapter X of the Bankruptcy Act, alleging that the corporation was insolvent and unable to pay its debts as they matured. An answer to the petition was filed by the corporation, in which it admitted that it was insolvent and unable to pay its debts, and, attached to its answer a resolution of the board of directors authorizing the admission of insolvency, together with a certificate that the resolution was a valid act of the corporation. Upon the basis of the petition and answer, and after a hearing, the court approved the petition and trustees were appointed. Thereafter, a lessor of the corporation came into the bankruptcy court and asked for an order terminating the corporation's lease, upon the ground that the lease contained a provision giving the lessor a right to terminate it if the tenant filed a petition in bankruptcy or was adjudicated a bankrupt or insolvent. The Bankruptcy Court ordered the lease terminated, and ordered the corporation to surrender possession of the property. Thereafter, the principal stockholder and a creditor petitioned the court for the vacation and setting aside of all proceedings, on the ground that the corporate officers had not realized that their lease could be terminated by the bankruptcy proceedings, and that if they had known that this

would follow they would not have consented to the adjudication of insolvency, because it would have frustrated any corporate reorganization. The trial court granted the motion as prayed, and on appeal the ruling was reversed. The court states that in ruling on a motion to vacate bankruptcy proceedings, the facts existing at the time the petition was filed must control, and nothing occurring thereafter can affect the original adjudication. In so holding the court states:

“The fact that subsequent events have proven that a reorganization is not possible without possession of this property by the trustee under the lease can have no effect upon the good faith at the time when the order for reorganization was entered. All the other elements of ‘good faith’ prescribed by the statute were present. No adequate relief was obtainable under Chapter XI, and no prior proceeding was pending at the time. At the time of the consideration of the order of vacation, strong affidavits were filed by one of the petitioning creditors and one of the attorneys for debtor, showing that the petition was filed in the belief that it was best for debtor and all concerned. The answer filed by Technical [debtor] bearing evidence of appropriate authorization might also be cited as evidence of good faith of petitioners. In any event, the court passed upon the question of fact and no ground other than practical impossibility of reorganization at the present time has been suggested to accomplish its overthrow.”



V.

The Appellants, With Full Knowledge of the Facts, Acquiesced and Participated in the Bankruptcy Proceedings From Their Inception for a Period of Approximately Two Years Before Making Any Objection to the Regularity of the Adjudication, and Thereby Have Been Guilty of Laches so as to Preclude Any Possible Right to the Relief They Seek.

For approximately two years prior to the making of the motion to vacate the adjudication, the bankrupt's estate had been administered under the supervision of the Bankruptcy Court. The administration was a very complicated one, with properties spreading over two states, California and Oregon, and with extensive litigation being undertaken and defended by the trustees both in the state courts and in the federal courts. Hundreds of claims have been filed in the estate, some of which were denied, some allowed, and some are still pending. Property has been sold, operated and leased; more than two million dollars have been received and disbursed by the trustees [Appellees' Tr. 38-44, 52]; the District Court found as a fact that appellants, and each of them, had been aware of the pendency of the bankruptcy proceeding since its inception on November 1, 1945. [Appellants' Tr. 124.] That finding has not been disputed by the appellants, and should, therefore, be accepted by this Court.<sup>22</sup> Notwithstanding that appellants had knowledge of these proceedings since their inception and had participated therein, they had made no

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<sup>22</sup>Subsection "d" of Rule 20 of the Rules of the Circuit Court of Appeals for the Ninth Circuit, see also O'Brien, Manual of Federal Procedure, Third Edition, page 208.

objection to the adjudication prior to the filing of their motion two years after the adjudication.

Solely on the basis of these undisputed facts, it is clear that the appellants' delay should of itself be a sufficient ground for denying their motion to vacate the adjudication. *No explanation has been offered by appellants as to why they waited approximately two years before initiating this proceeding.*

In the case of *Mason v. Dean* (C. C. A. 9th, 1929), 31 F. 2d 945, 13 A. B. R. (N. S.) 771, the moving parties waited for approximately six months before seeking to vacate the adjudication in bankruptcy. In holding that laches was a sufficient basis for denying the motion, the court stated:

"We are of the opinion that the appeal should be dismissed on the ground that the petitioner's right to object to the adjudication was lost by laches. As already stated, the adjudication was made March 21, 1928, and the petition to vacate was not filed until September 24th following. There is no reason given for the delay in filing the petition. The objection to the jurisdiction does not appear on the face of the record, but depends upon facts which must be proven. An interested party cannot stand by and allow the administration of the estate to proceed until he considers that it will be to his advantage to avoid the adjudication. He must move against it promptly, if at all, and this the petitioner failed to do. *Rudebeck v. Sanderson* (C. C. A. 9th), 225 Fed. 575, 36 A. B. R. 146."

In the case cited by the court, *Rudebeck v. Sanderson*, there was a delay of approximately one year and three months, and the motion to vacate the adjudication was

based upon one of the same grounds made by the appellants in the instant case, to-wit, that the proper corporate officials had not signed the consent to adjudication. In affirming the trial court's refusal to vacate the adjudication, the court stated:

"The petitioner Rudebeck had notice of the adjudication as early as March 23, 1914, because on that date he filed his claim against the corporation with the referee in bankruptcy. When the other petitioners received notice of the adjudication does not appear; but they could not stand idly by and permit the administration of the estate to proceed in the bankruptcy court until some step was taken that did not meet with their approval. Whether the petition in bankruptcy was filed by competent authority or not, it was the duty of the petitioners to move against it promptly, if at all, and this they failed to do." (Citing cases.)

There are many cases in accord.<sup>23</sup>

In the present case the vast holdings of the bankrupt and the complexity of the administration show that any setting aside of the adjudication would adversely affect hundreds of innocent people who have dealt with the

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<sup>23</sup>*In re Ives* (C. C. A. 6th), 113 Fed. 911, 7 A. B. R. 692;  
*Morales v. Todd* (C. C. A. 1st), 79 F. 2d 601, 30 A. B. R. (N. S.) 290;  
*Alexander v. Farmers Supply Co.* (C. C. A. 5th), 275 Fed. 824, 47 A. B. R. 302;  
*In re Bankshares Corp.* (C. C. A. 2d), 55 F. 2d 335, 18 A. B. R. (N. S.) 471;  
*Globe Paper Co. v. Travis Drug Co.* (C. C. A. 6th), 112 F. (2d) 350, 43 A. B. R. (N. S.) 200.

bankrupt estate. As stated by the Eighth Circuit Court of Appeals in *Smith v. The Chase National Bank of the City of New York* (1936), 84 F. 2d 608, 31 A. B. R. (N. S.) 472:<sup>24</sup>

“For more than two years before appellants’ petitions were filed, it [the bankruptcy court] had been administering these assets, and through its officers, conducting the extensive business of the bankrupts. It had collected their assets and passed upon the claims of their creditors, all of which had been paid, purchased, or in some way satisfied by the time the appellants’ petitions were filed. The title of the trustee in bankruptcy to the assets was marketable, so that the assets could be sold, and offers had been made for them, which the court determined should be accepted.” (84 F. 2d at 613.)

In the instant case numerous properties of the bankrupt had actually been sold to innocent parties. Clearly, the delay of the appellants in making their motion to vacate the adjudication is a sufficient ground for estopping them from having the adjudication set aside. We respectfully urge this contention without prejudice to our position that no legal or equitable basis has been proven by the appellants which would in any manner support their appeal.

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<sup>24</sup>Cited by appellants on page 23 of their opening brief. See also the discussion relating to this case appearing on pages 13 to 16, *supra*.



VI.

**Vacating and Setting Aside the Order of Adjudication Is Not the Proper Remedy for Any Alleged Misconduct of the Trustees or Other Officers of the Bankruptcy Court in the Administration of the Bankrupt Estate Subsequent to the Order of Adjudication.**

Appellants' principal contention, in support of their motion to vacate the adjudication, seems to be that the administration of the bankrupt estate by the trustees and the Bankruptcy Court has resulted in some sort of religious persecution. All the alleged acts complained of occurred after adjudication. The remedy for the improper administration of the bankrupt estate is not to vacate the adjudication. If there is any dissatisfaction with any ruling of the Bankruptcy Court, any aggrieved party has the right to take a review.<sup>25</sup>

Any alleged misconduct of the trustees can be brought to the attention of the court, and, upon a proper showing the trustees can be removed. Section 2a (17) of the

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<sup>25</sup>During the course of appellants' extensive offer of proof in which the alleged misconduct of the trustees and the Bankruptcy Court was referred to, the District Judge below stated [Appellants' Tr. p. 36]:

"But have you chosen the proper method here? Anything the Referee does can be reviewed by this Court; anything this Court does can be reviewed by the United States Circuit Court of Appeals, and anything the United States Circuit Court of Appeals does can be reviewed by the Supreme Court of the United States.

"If the Referee has made any improper order in this matter, it is open to review; if this Court has made any improper order it is open to review; if the trustees have abused their offices, isn't the remedy to remove the trustees?"

Bankruptcy Act (11 U. S. C. A., Sec. 11), reads as follows:

“Courts of bankruptcy may: . . . (17) approve the appointment of trustees by creditors, or appoint trustees when creditors fail so to do; and, upon complaints of creditors, or upon their own motion, remove for cause receivers or trustees upon hearing after notice.”

The rule laid down by this court in *Matter of Larsen* (C. C. A. 9th, 1941), 124 F. 2d 121, 47 A. B. R. (N. S.) 787, that an order of adjudication can be vacated only (1) for lack of jurisdiction, or (2) for extrinsic fraud, is a clear recognition that the motion to vacate is directed to facts existing at the time of the filing of the petition in bankruptcy. Nothing occurring thereafter can have any bearing upon the propriety of the adjudication.

This rule was recognized in the case of *McDonough v. Owl Drug Co.* (C. C. A. 9th, 1935), 75 F. 2d 45, *cert. den* 295 U. S. 750, where the court affirmed the trial court's denial of a motion by preferred stockholders of a bankrupt corporation to vacate a voluntary adjudication on the ground of extrinsic fraud. One of the contentions by the moving parties in that case was that fraud had been perpetrated in connection with the liquidation sale of the bankrupt estate, in that the bidding at such sale was “stifled.” This court, in disposing of that contention stated:

“Appellants are not attacking the sale and seeking to have the property resold at a sale where bidding

will be fair and unrestricted. Appellants seek to annul the adjudication in bankruptcy to the end that the entire bankruptcy proceeding shall be a nullity. Obviously such is not the proper remedy for stifling bidding at a judicial sale.” (75 F. 2d at 54.)

It would appear from the arguments made on pages 23 to 26 of appellants’ opening brief that appellants are well aware of the fact that they have misconceived their remedy. Appellants argue that any vacation of the adjudication in the instant case would operate prospectively “to prevent any future misconduct . . . if for any reason the present remedy does not appeal to the Chancellor.” None of the cases cited by appellants recognize such a procedure, and we have been unable to find any cases where such a rule is announced. Indeed, the very cases cited by appellants<sup>26</sup> are conclusive authority for the proposition that a vacation of an adjudication in bankruptcy is a judicial declaration that the adjudication was void *ab initio*.

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<sup>26</sup>*Smith v. Chase National Bank of the City of New York*, 87 F. 2d 608;

*In re Fox West Coast Theatres*, 88 F. 2d 212;

*In re Ettinger*, 76 F. (2d) 741,

all cited on pages 23 and 24 of Appellants’ Opening Brief.

VII.

**The Exercise of the Power to Vacate an Adjudication Rests in the Sound Discretion of the Bankruptcy Court, Reviewable Only for a Clear Abuse of That Discretion; No Abuse of Discretion Is Shown in the Present Record.**

The record of the hearing in the court below shows that the court considered an extensive offer of proof made by the appellants herein and denied the motion. The written order of the court set forth the grounds therefor, and it is clear therefrom that there was no possible abuse of discretion in the ruling.

The applicable principles have been well stated by this Court in the leading case of *McDonough v. Owl Drug Co.* (C. C. A. 9th, 1935), 74 F. 2d 45, cert. den. 295 U. S. 750, in which this Court affirmed the District Court's denial of a motion by preferred stockholders of the bankrupt corporation to vacate and set aside a voluntary adjudication. The court stated (75 F. 2d at 53):

“A proceeding of this character is addressed to the sound judicial discretion of the court and must be predicated upon considerations which will appeal to the conscience of a chancellor, and the relief sought will be granted or denied, depending upon what a careful balancing of all pertinent equitable factors dictates to be just. Let it not be forgotten that in liquidating a bankrupt corporation the rights of creditors come first. The interests of corporate stockholders in such proceedings are always secondary and subordinate to the interests of the corporate creditors. Indeed, it is only after the lawful claims of creditors are satisfied that the rights of stockholders attach for prac-



tical purposes. Unless there is a surplus over and above the amount necessary to satisfy creditors, there is nothing to which the stockholders may assert any claim. Creditors are the peculiar favorites of courts of bankruptcy. When a court of bankruptcy is asked to assert its incidental equity powers, its action must be governed by precisely the same principles and considerations which would move a chancellor to action. With these elementary principles in mind it does not seem difficult to chart a true course in this case. The learned trial court, in dismissing appellants' petition, stressed the question of laches and palpably, in face of the facts to which we have already adverted, there is much to be said in support of that view. However, we prefer to rest the determination of the controversy upon what we consider to be a broader and a more fundamental ground, viz., the want of equity in the petition in the light of the circumstances of the case in hand. It requires no unusually vivid imagination to picture measurably the consequences which would follow if the adjudication in question should be set aside. No creditor is complaining. No creditor has manifested any dissatisfaction with the adjudication, nor with the steps which have been taken in liquidating the estate. The creditors holding approved claims are relieved from the injurious effects of the onerous long-time leases made under conditions vastly different from those prevailing at the present time. Large sums have been expended in liquidating the estate which would be irretrievably lost if the adjudication should be annulled. The fund of \$1,550,000, now in the custody of the court, would be withdrawn from

the creditors, and they would be launched upon a sea of chaos and confusion. They would be postponed in the enjoyment of their rights and be subjected to untold hazard, expense, delay and inconvenience. And all this to the end that preferred stockholders may speculate through protracted litigation, without regard to the hurt of creditors, in the hope that something may be salvaged for themselves. If it be suggested that claims of landlords have been rejected or reduced, the obvious answer is that such landlords are not complaining and appellants cannot be heard to complain in their behalf. If the adjudication should be set aside, the leases of these landlords would automatically be reinstated, and with these claims revived it is too plain for serious discussion that there would not be any surplus over and above the debts to which appellants could assert any claim. In these circumstances it would be inequitable, unconscionable, and unjust to subject the creditors to the evils and hazards which the cancellation of the adjudication would inevitably entail. The creditors of the bankrupt corporation are not involved in the fraud upon which appellants rely. The creditors are as innocent of the wrong complained of as are the appellants themselves. If the allegations of appellants' petition be taken for true, the creditors, like themselves, are the victims of a fraud, not the authors of it. The creditors have done nothing to harm or injure the appellants, and while courts of bankruptcy may, in the exercise of their incidental equity powers, preserve the integrity of their processes and protect themselves against fraud, trickery, and imposition, these

powers may not be invoked by one class of litigants to the injury, detriment, or hazard of another class who are themselves blameless, and especially is this true when the class sought to be adversely affected occupy a favored position and who possess rights of superior and paramount dignity to the class seeking the intervention of the court. In relieving against fraud the consequences must be laid at the door of those who perpetrate it.”<sup>27</sup>

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<sup>27</sup>In the matter of *Fortnum & Mason, Inc.*, 85 F. 2d 519, 32 A. B. R. (N. S.) 11, the Sixth Circuit Court of Appeals states the rule as follows:

“And so when the order below was made the court was faced with a situation where adjudication had been had upon a voluntary petition in bankruptcy which had been duly authorized, and filed by an insolvent corporation in the court having jurisdiction; and liquidation of its assets had been practically completed when the appellants filed their petition to intervene and set the adjudication aside. Whether or not the petition should be granted was to be decided in the sound discretion of the court. *Banco Commercial De Puerto Rico v. Hunter Benn & Company* (C. C. A. 1st Cir.), 14 Am. B. R. (N. S.) 95, 31 F. 2d 921. It is apparent that the appellants did not establish facts entitling them to affirmative relief and that there was no abuse of discretion in denying their petition. *In re De Lue* (C. C. A. 1st Cir.), 3 Am. B. R. (N. S.) 479, 295 F. 130.”

The case presented a factual situation very similar to the one involved in the instant case. In that case the corporation had filed a voluntary petition in bankruptcy and an adjudication was had thereon the same day. Shortly thereafter a trustee was elected who took over the assets and sold practically all of them in order to wind up the business through liquidation. Almost two months later a petition was brought by three preferred stockholders of the bankrupt corporation to vacate the adjudication on the ground that the controlling stockholder of the bankrupt had caused the bankrupt, although in fact solvent, to file its petition in bankruptcy for the fraudulent purpose of permitting such a controlling stockholder to cancel a certain contract that it had with the bankrupt, to the prejudice of the petitioners and other preferred shareholders of the bankrupt corporation. The court held that it was no abuse of discretion



A glance at the record in the instant case demonstrates that the court below properly exercised its discretion in denying the motion of appellants. We have heretofore pointed out the vast property holdings of the bankrupt, and the complexity of the administration. As stated by the United States Supreme Court in *Wayne United Gas*

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to deny the petition to vacate the adjudication under these circumstances.

In *Banco Commercial De Puerto Rico v. Hunter Benn & Co.*, 31 F. 2d 921, 14 A. B. R. (N. S.) 95, the First Circuit used the following language:

"It is apparent that the refusal of the court to grant leave to the bank to file an answer after the decree of adjudication had been entered is of no moment, unless its refusal to vacate the decree was erroneous.

It was discretionary with the District Court whether it would or would not vacate the decree of adjudication. And its refusal to do so presents no question for review on this appeal under section 24b, in the absence of a showing that it abused its discretion. *In re De Lue* (C. C. A., 1st Cir.), 3 Am. B. R. (N. S.) 479, 295 F. 130; *Blackstone v. Everybody's Store* (C. C. A., 1st Cir.), 30 Am. B. R. 497, 207 F. 752.

The court did not abuse its discretion in refusing the bank's request to vacate the decree. The petition in bankruptcy was filed October 18, 1927, and was made returnable November 2, 1927. Within five days after the return day the bank could have filed an answer, as a matter of right, or procured a reasonable extension of the time for so doing. Section 18b (11 U. S. C. A. §41b). It did neither of these things, but waited until March 16, 1928 (some 4½ months after the return day) and until after a decree had been entered. It then asked that the decree be vacated and that it be permitted to intervene and answer the petition. These facts do not show an abuse of discretion, but a proper exercise of it."

In *Smith v. Chase National Bank*, 84 F. 2d 608, 31 A. B. R. (N. S.) 484, the court states:

"Assuming, without deciding, that appellants had a sufficient interest in the proceeding to ask that the adjudication be vacated, we are satisfied that, under the circumstances, the court was guilty of no abuse of discretion in refusing to entertain the petitions in so far as they sought to vacate the adjudication."

See also *In re First National Bank of Belle Fourche* (C. C. A. 8th, 1907), 152 Fed. 64, 18 A. B. R. 265.



*Co. v. Owens-Illinois Glass Co.* (1937), 57 S. Ct. 382, 33 A. B. R. (N. S.) 1, at 7:

“The rule which governs the case is that the bankruptcy court, in the exercise of a sound discretion, *if no intervening rights* will be prejudiced by its action, may grant a rehearing upon application diligently made and rehear the case upon the merits.” (Emphasis added.)

The rule is succinctly stated by the Eighth Circuit Court of Appeals in the case of *Wharton v. Farmers & Merchants National Bank* (1941), 119 F. 2d 487, 45 A. B. R. (N. S.) 813, at 817:

“The rule is that an erroneous order made during the progress of a bankruptcy proceeding, although not appealed from, may subsequently be set aside and vacated unless rights have become vested in reliance upon it which will be disturbed by its vacation. *Sandusky v. National Bank*, 90 U. S. 289, 292-293; *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U. S. 131, 136-137; *Reber v. Home Owners' Loan Corp.* (C. C. A. 8th Cir.), 36 A. B. R. (N. S.) 297, 96 F. (2d) 77, 78-79.”

The most recent pronouncement of this principle which we have been able to find was made by the Third Circuit Court of Appeals in *In re Technical Marine Maintenance Co.* (April, 1948), C. C. H. Bankruptcy Service #56,241, where the court reversed an order of the trial court which had vacated an involuntary adjudication in bankruptcy at the request of a stockholder and a creditor, on the

ground that they did not understand the nature of the proceedings or the result that would follow. The court states:

“An order which would have been set aside upon appeal, or which the court which granted it would have vacated before the situation changed, will not be disturbed where rights have vested in consequence of the entry thereof, because it is impossible to re-establish the pre-existing status and because powers which then sprang into being have been exercised and have founded rights in third parties.”

In that case the court felt, as did the court below in the instant case, that the vacation of the adjudication would cause injury to innocent third parties.

### Conclusion.

We respectfully submit that each and every one of the foregoing grounds is of itself sufficient to uphold the ruling of the District Court.

Wherefore, appellees pray that the order of the District Court be affirmed by this court.

Respectfully submitted,

MARTIN GENDEL,  
FRANK C. WELLER,  
THOMAS S. TOBIN,

By MARTIN GENDEL,

*Of Counsel for Appellees, Trustees in Bankruptcy.*









No. 11874  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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In the matter of

CHRIST'S CHURCH OF THE GOLDEN RULE, a California  
Non-Profit Religious Corporation,  
Bankrupt.

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PETER PETERSEN, MRS. PETER PETERSEN and GEORGE D.  
PATRICK,

*Appellants,*

*vs.*

PAUL W. SAMPSELL, L. BOTELER and MCINTYRE FARIES,  
as Trustees in Bankruptcy of the Estate of Christ's  
Church of the Golden Rule, Bankrupt, and CHRIST'S  
CHURCH OF THE GOLDEN RULE, BANKRUPT,  
*Appellees.*

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**TRANSCRIPT OF RECORD**  
**APPENDIX.**

Upon Appeal From the District Court of the United States  
for the Southern District of California  
Central Division

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In the District Court of the United States for the Southern District of California, Central Division.

In the Matter of Christ's Church of The Golden Rule, a non-profit California corporation, Debtor. In Bankruptcy No. 44128 WM.

PETITION FOR ORDER AUTHORIZING THE FILING OF PETITION FOR ARRANGEMENT UNDER THE PROVISIONS OF CHAPTER XI WITHOUT THE FILING OF A SCHEDULE OF ASSETS AND LIABILITIES AND STATEMENT OF AFFAIRS.

*To the Honorable Judges of the United States District Court, in and for the Southern District of California, Central Division:*

The verified petition of the Christ's Church of The Golden Rule, a non-profit California corporation, respectfully represents to the Court as follows:

I.

That it is filing herewith a petition for arrangement and a plan of arrangement under the provisions of Chapter XI of the Bankruptcy Act, as amended, and with reference thereto incorporates the same herein as though fully set forth herein.

II.

That your petitioner is unable to file herewith at this time an accurate schedule of its assets and liabilities inasmuch as the books and records of the corporation are now in the process of being audited by your debtor's auditors and accountants, and because of the vast holdings and operations by said corporation throughout the states of California and Oregon and because of the large number

of creditors, secured and unsecured, which have been acquired by virtue of said operations. It is contemplated, however, that a schedule of the assets and liabilities and statements of affairs can and will be filed within a period from ten (10) to fifteen (15) days.

### III.

That it is highly essential that the petition and plan of arrangement under and pursuant to the provisions of Chapter XI of the Bankruptcy Act, as amended, be filed forthwith in order that the best interests of this corporation and all creditors, secured and unsecured, may be protected.

Wherefore, your petitioner prays that an order be made and entered herein authorizing your petitioner to file its petition for plan of arrangement and plan of arrangement under the provisions of Chapter XI of the Bankruptcy Act, as amended, without the necessity of filing its schedule of assets and liabilities and its statement of affairs for a period of ten (10) days from the date hereof.

CHRIST'S CHURCH OF THE GOLDEN RULE,  
A Non-profit California Corporation,

A. E. KNAPP, (Seal)

By A. E. Knapp, Secretary and  
Treasurer,

*Petitioner.*

RUSSELL E. PARSONS and  
COBB & UTLEY,  
ERNEST R. UTLEY,

*Attorney for Debtor.*

State of California, County of Los Angeles—ss.

I, A. E. Knapp, Secretary and Treasurer of Christ's Church of The Golden Rule, a non-profit California corporation, the petitioning debtor mentioned and described in the foregoing Petition for Order Authorizing the Filing of Petition for Arrangement, etc., hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

A. E. KNAPP.

A. E. KNAPP.

Subscribed and sworn to before me this 1 day of November, 1945.

Seal

BLANCHE MORRIS,

*Notary Public in and for the County of Los Angeles  
State of California.*

My Commission expires July 22, 1947.

Endorsed: Filed Nov. 1, 1945, 4:45 p. m. Edmund L. Smith, clerk; by E. M. Enstrom, Jr., deputy clerk.



## [TITLE OF COURT AND CAUSE.]

ORDER AUTHORIZING THE FILING OF PETITION FOR  
ARRANGEMENT UNDER THE PROVISIONS OF CHAPTER  
XI OF THE BANKRUPTCY ACT, AS AMENDED, WITH-  
OUT THE FILING OF A SCHEDULE OF ASSETS AND  
LIABILITIES AND A STATEMENT OF AFFAIRS.

Upon the reading and filing of the verified petition of the above named debtor, and good cause appearing therefrom, and upon motion of Russell E. Parsons, and Cobb & Utley, its attorneys, no adverse interests appearing thereat,

It is ordered that Christ's Church of The Golden Rule, a non-profit corporation, be, and it is hereby authorized to file its petition for arrangement and plan of arrangement under and pursuant to the provisions of Chapter XI of the Bankruptcy Act, as amended, without the necessity of filing at this time a schedule of assets and liabilities and statement of affairs.

It is further ordered that said schedule and statement of affairs shall be filed on or before the 13 day of November, 1945, unless said time is further ordered extended by the Court.

Dated: This 1st day of November, 1945.

H. A. HOLLZER,  
*United States District Judge.*

Endorsed: Filed Nov. 1, 1945, 4:45 p. m. Edmund L. Smith, clerk; by E. M. Enstrom, Jr., deputy clerk.

PETITIONER'S EXHIBIT 1.

ARTICLES OF INCORPORATION

OF

CHRIST'S CHURCH

OF

THE GOLDEN RULE

Know All Men by These Presents :

That we, the undersigned citizens and residents of the State of California, do hereby voluntarily associate ourselves together for the purpose of organizing a private corporation under Title XII, Article I of the General Non-Profit Corporation Law of the State of California, for purposes other than pecuniary profit, and which will at no time function for pecuniary gains, profits, or dividends, and does not contemplate the distribution of pecuniary gains, profits, or dividends, to the members of the corporation or to anyone; and we do hereby certify:

FIRST: That the name of said corporation shall be

Christ's Church

of

The Golden Rule

SECOND: That the general purposes for which this corporation is organized are:

(a) In accordance with rules of procedure approved in writing by the trustee or trustees hereof to teach and promote the spiritual and religious welfare of mankind and particularly to promulgate the teachings of Christ Jesus as found in the King James version of the Holy Bible, most particularly the economic teachings of Christ Jesus, and to this end to maintain and carry on churches whenever and wherever to the trustee or trustees it seems the

most good might be done by so doing; to teach those things that in the opinion of the trustee or trustees will tend to forever end the causes and evils of war, poverty, illiteracy, superstition, greed, brutality, hate, selfishness, man's inhumanity to man and his subjection to the blind so-called forces of nature and materiality; to teach such subjects as will encourage mankind to adopt Christ Jesus' "Golden Rule" of absolute "economic" equality as the corner stone of a world-wide and universally accepted system of all individual, industrial, business, political, national and international relationships; to teach that men should worship and glorify "God," not other men whom they set upon thrones and literally worship and glorify as they would an "idol," until such men become their masters with the power of life or death in their hands, as though "they" were God Himself or as though mankind were slaves who lived only to do the bidding of these idolatrously worshipped pigmy gods of wrath, greed and hate; to teach that there is but "one" God—omniscient, omnipotent and omnipresent Life, Truth and "Love"—who lovingly cares and provides for all of His children impartially and "equally" from His limitless and inexhaustible universe; to teach that because of the infinite affluence of our Creator—the vastness and infinitely abundant substance of His universe—greed, selfishness, economic competition, poverty, jealousy, hate and war are but manifestations of moral idiocy—expressions of ignorance, superstition and stupidity.

(b) In accordance with rules of procedure approved in writing by the trustee or trustees hereof to teach and promote the spiritual, moral and financial welfare of all mankind; to teach and give instructions in the general science of life and nature by means of any practical educational

methods, and to teach and exemplify by any practical means, with any or all suitable or necessary agencies, natural or artificial, causation, and resulting natural effects in any or all things, operations, or conditions appertaining to human life or affairs individually and/or collectively; and particularly to teach and promote any and all sciences or subjects contributing to human welfare or human understanding, and to this end to do anything conducive to the furtherance of the purposes and objects herein specified; to teach and exemplify the use of money or credit in any and all of its economic functions, and generally to teach and exemplify worthy and righteous business methods and scientific ways of procedure based upon Christ Jesus' "Golden Rule" of absolute and impartial universal economic equality.

(c) In accordance with rules of procedure approved in writing by the trustee or trustees hereof to seek, search for, discover, collect, reveal, teach, publish, circulate and practice the highest and best knowledge or trust respecting man's origin and his physical, material, mental, moral, religious and spiritual status, progress, development and welfare as found, exemplified, reflected or evolved in or from racial development, traditions, custom, history, economics, morals, philosophy, ethics, religion, the arts and sciences, education, astronomy, metaphysics, divine healing or healing by prayer, from and in all forms, processes and methods of investigation, experimentation and research, learning, education and culture;

(d) In accordance with rules of procedure approved in writing by the trustee or trustees hereof to foster and promote interest in the social, economic, financial, educational, and civic conditions of all mankind; to assist in the education and training of those interested in the social,



economic, financial, educational, and civic conditions of all mankind; to maintain departments for the study of national and international economic, financial, educational and civic problems; to procure and employ any or all kinds and types of help, including professional and voluntary help, for all projects, activities, or undertakings of the corporation; and whenever desirable or necessary, to provide for their compensation, either in money, exchange of services or commodities;

(e) To acquire, own, found, establish, organize, finance, equip, operate, direct and maintain and control churches and seminaries in connection therewith for the purpose of teaching and instruction of the teachings of the King James version of the Holy Bible and of Christ Jesus, and of training and educating ministers and teachers and ordaining the same;

(f) To acquire, own, found, establish, organize, finance, equip, operate, direct, maintain and control associations, clubs, societies, forums, centers, auditoriums, lecture halls, schools, fellowships, scholarships, colleges, universities, educational foundations, laboratories, libraries, printing and publishing plants, newspapers, journals and magazines, radio receiving and broadcasting stations, co-operative exchanges, recreational centers and facilities, clinics, sanitariums, rest homes, and all lawful physical and curative practices, methods, facilities, and institutions proper and expedient to or for the exercise and purposes of the corporation; and further, to acquire, own and hold real and personal property of any kind, and to lease, sell, convey, mortgage, hypothecate, or otherwise dispose of the same as provided by law and to assist and forward the establishment of similar organizations and groups throughout the world;

(g) To receive donations, contributions, tuitions or remuneration and any and all forms of income for educational or economic services, or for publications or for courses of instructions or for any other purpose, and to use, disburse, give away or loan such funds for promoting the objects and purposes of the corporation; to borrow money, contract debts, and to issue notes or other obligations, secured and unsecured, of the corporation from time to time, for moneys borrowed or in payment for property acquired or for any of the other objects or purposes of the corporation;

(h) To engage or employ any person or persons as may be required in extending and furthering the objects and purposes of the organization, and to compensate such persons by payment of salaries, commissions or otherwise, in money, services or commodities;

(i) To carry on a general advertising, publicity, publishing, selling and printing business in all of its branches, both as principals and agents; to carry on the business of printers, publishers, stationers, bookbinders, engravers, photographers, dealers in paper and of plain and fancy articles, publications of all kind, textbooks, courses of instruction, and dealers in any other articles of a character similar or analogous to the foregoing, or any of them, or connected therewith, and in fact to undertake and transact all kinds of merchandising, sales campaigns, advertising and publicity business of every kind, character, nature and description, and in fact to undertake and transact all kinds of agency business which an individual may lawfully undertake; and to act as agency or representative of corporations, firms, and individuals, and as such to advertise, publicize, circularize, develop and extend the business interest of firms, corporations and individuals

by printing, publishing, advertising, propagandizing, mail order, silent or talking motion pictures, radio and television methods, systems or campaigns;

(j) To take photographs, silent or talking motion pictures and television silent or talking pictures of public and private events and of prepared acts, auditions, scenes and events, articles, books and manuscripts, and to prepare, make, sell, lease and dispose of all of said photographs, talking motion pictures and television talking pictures of public and private events and of prepared acts, auditions, scenes and events; books, articles and manuscripts;

(k) To acquire by purchase or otherwise, own, hold, buy, sell, convey, exchange, lease, mortgage or encumber real estate or other property, personal or mixed, franchises, licenses, rights, trademarks, copyrights, trade names, patents, inventions, and to do all and everything necessary, suitable, convenient or proper for the accomplishment of any of the purposes, or the attainment of any of the objects hereinabove enumerated;

(l) To establish branch organizations in any lawful place for like purposes as herein specified;

(m) To ever render aid and succor to the down-trodden and those whose rights may have been or appear about to be invaded and to this end to do any and all things, and to take any and all action which in the opinion of the trustee or trustees appears right and necessary;

(n) To do any and all things which in the opinion of the trustee or trustees seem necessary, suitable, convenient or proper for or in connection with or incidental to, the accomplishment of any of the purposes, or the attaining of anyone or more of the objects herein enumerated or designed, directly or indirectly, to promote the interests

of this corporation; and, in general, to do any and all things and exercise any and all powers which it may now or hereafter be lawful for the corporation to do or exercise under the laws of the State of California that may hereafter be applicable to this corporation;

(o) To conduct its business in all or any of its branches in the State of California, and in any or all other states, territories, possessions, colonies and dependencies of the United States of America and in the District of Columbia and in any and all foreign countries, and to have one or more offices within and outside the State of California;

(p) To adopt such rules, regulations and by-laws for the conduct, government and control of this corporation as may not be inconsistent with the laws of the State of California, or the laws of the United States. All by-laws, rules of procedure, appointment of officials and acts of any kind whatsoever, including the acts specified in the foregoing articles, by the officials, ministers, agents, representatives, associates or co-workers of this church organization pertaining in any way to the activities and/or interests of this corporation shall first be subject to the approval of the trustee or trustees which approval shall be expressed in writing and acknowledged before a notary public.

THIRD: That the principal office for the transactions of business of this corporation, is to be located in the County of Los Angeles, State of California.

FOURTH: The number of directors shall be not less than three (3) persons elected to act until the first annual meeting of the Founder Members, or until the election or qualification of their successor or successors, are as follows:



Name	Address
H. M. Dunham	Fresno, California
F. W. McGugin	Fresno, California
George T. Scott	Fresno, California

FIFTH: The Founder Members shall appoint a trustee or trustees who shall thereafter have the power to appoint his or their successor or successors in whatever manner he or they may select by agreement, will or otherwise, providing that the instrument by which said successor, trustee or trustees is or are appointed shall be acknowledged before a notary public.

SIXTH: If, in the unanimous judgment of the trustee or trustees, and the Founder Members, expressed in writing and acknowledged before a notary public, it seems desirable so to do, the number of directors may be changed from time to time by a by-law fixing or changing said number duly adopted in accordance with the laws of the State of California.

SEVENTH: The Articles of Incorporation of this Corporation may be amended and/or repealed only by resolution approved by all of the directors and by the unanimous vote or the unanimous written consent of the Founder-Members and the trustee or trustees of this corporation representing the entire voting power thereof. Said written consent shall be acknowledged before a notary public.

IN WITNESS WHEREOF, said incorporators have hereunto set their hands and seals this 29th day of December. 1943.

/s/ H. M. DUNHAM  
/s/ F. W. MCGUGIN  
/s/ GEORGE T. SCOTT

State of California, County of Fresno—ss.

On this 29th day of December, 1943, before me, Velma K. Snow, a Notary Public, in and for said county, personally appeared H. M. Dunham, F. W. McGugin, George T. Scott, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same.

/s/ VELMA K. SNOW,

Notary Public in and for the County of Fresno,  
State of California.

My Commission Expires Mar. 10, 1946.

CHRIST'S CHURCH OF THE GOLDEN RULE  
BY-LAWS

\* \* \* \*

ARTICLE I—OFFICES

Section 1. Principal Office. The principal office for the transaction of the business of the Corporation is hereby fixed and located at Los Angeles, County of Los Angeles, California.

Section 2. Other Offices. Branch or subordinate offices may be at any time established by the Board of Directors with the written approval of the Trustee or Trustees, at any place, or places, where the Corporation is qualified to do business.

ARTICLE II—MEMBERS

Section 1. Membership. The Members of This Church Shall Be Considered as "The Children of the Church" and, in accordance with the judgment of its Board of Directors and Trustee, or Trustees, this Church shall endeavor to meet every need of its members (including the needs of this world as well as spiritual needs) in the same manner as a wise and loving father and mother, in accordance with their best judgment and means, would constantly strive to provide security, progress and happiness for their children . . . it being specifically understood, however, that its principal effort, resources and income shall be devoted to promulgating and establishing (both by precept and actions) its concept of Christ Jesus' ministry as described in the Charter comprising the original Articles of Incorporation of this Church which was granted by the State of California, in the United States of America, on January 20, 1944.

After January 20, 1945, no one shall ever be accepted as a member until he, or she, has legally deeded and/or transferred, by properly executed deed or bill of sale, to this Church—Christ's Church of The Golden Rule—all of his, or her, worldly goods, both real and/or personal, and has agreed to devote all of his, or her, resources, life, talents and energies thereafter to the activities of this Church and the ushering into the lives of all mankind that "kingdom of heaven" which Christ Jesus declared was not afar off, but near at hand, and which could be entered whenever men would truly live "the Golden Rule" in their every relationship with one another.

No member or official shall "ever" have any personal, proprietary or legal right, title or interest in or to any properties, resources, assets or income of this Church; and it is specifically understood and agreed that whatever occupancy or use of Church property a member may be permitted to enjoy shall be subject solely to the discretion of its Board of Directors and Trustee, or Trustees—with no right of recourse of any kind whatsoever—and that upon a member's withdrawal, removal or decease, or upon demand of the Board of Directors and Trustee, or Trustees, all real or personal property in the possession of, or being used by, said member shall "immediately" be relinquished to such member, or members, of this Church as may be authorized, in writing, to receive possession thereof by its Board of Directors and Trustee, or Trustees, in accordance with their own absolute discretion.

Inasmuch as no one, after January 20, 1945, while a member of this Church, shall ever "personally" own or have a legal right or title to any real estate or personal properties or assets of any kind whatsoever, but shall by proper deed and/or bill of sale place all legal title or own-



ership rights therein in the name of Christ's Church of The Golden Rule, a religious non-profit corporation, in recognition of the fact "That All Things" belong to God—that although man may enjoy the use of all that God has created, he can actually never "own" anything inasmuch as he brings no possessions with him when he arrives in this world nor takes any away with him when he leaves—and that, therefore, the Members of this Church desire, and have agreed to donate, as an outright gift to this Church—Christ's Church of The Golden Rule—not only all of the worldly possessions which they may have had when they joined this Church, or later acquired by inheritance, discovery, gift, earnings, or in any other way whatsoever during their membership herein, but also all talents, ability and labor toward the end that the major objectives and purposes of Christ's Church of The Golden Rule shall, as quickly as possible, be brought to their successful conclusion and the aims of the Church, as described in its original charter, hereby fulfilled that God may be glorified and the teachings of Christ Jesus adopted as a "practical" as well as a spiritual way of life by the peoples of all the world.

Recognizing the fact that there could be neither group strength nor influence without self-discipline and well-timed synchronization and co-ordination of group effort, it shall be an "irrevocable" condition of membership in this Church that the instructions and/or recommendations and/or directions of those officially vested with authority or placed in positions of supervisory capacity shall (so long as such compliance requires the breaking of neither the laws of our country nor the fundamental precepts of Christ Jesus' Sermon on the Mount) be "instantly" complied with and/or acted upon without either argument or

debate, unless the member imparting such guidance or direction invites a discussion of the matter, in which event his or her final decision shall be accepted and acted upon without further discussion. . . . It is understood, however, that the member giving such instructions shall be responsible for the results thereof. By this rule of procedure both poor judgment and good judgment are more quickly demonstrated, bringing more readily and rapidly, to us all, the benefits of the latter and disclosing with the least possible delay the evidence of mistaken or poor judgment, that necessary adjustments or corrections may be made.

After January 20, 1945, no one (during his or her membership in this Church)—except “Initiate” Members—shall ever join, accept or retain membership in any other church, lodge, club, union or organization of any kind whatsoever, but instead shall devote what might thus be spent in time, thought and energies to the further advancement of one or more of the activities of our own Church family, since the broad channels of service to God and our fellowman contained within the structure of our own organization provide ample opportunity for the exercise of our every talent and the use of every available moment of our time and energy in forwarding the crusade which our Church has inaugurated that the lives of all men, women and children, “everywhere”, might be filled with security and happiness, and that Christ Jesus’ Golden Rule of “economic” equality might be established in the hearts and lives of all mankind.

After January 20, 1945, all Members of this Church shall—as rapidly as is practical and possible under its By-Laws and procedure—be trained to represent it as missionaries and/or ministers. When, in the judgment of

the Board of Directors and the Trustee, or Trustees, they are deemed qualified, they shall be duly ordained as ministers of Christ's Church of The Golden Rule. Pending such formal ordination, each and every member of this Church, after January 20, 1945, shall be considered as a student of the teachings of Christ Jesus (as understood and promulgated by this Church) preparing to minister unto mankind in the way that this Church believes will most clearly and accurately exemplify the essence and major purposes of Christ Jesus' life work and ministry.

## Section 2. Classification of Members.

(a). Founder Members: Founder Members are the first three persons who shall subscribe to the original By-Laws of the Corporation and from whom the first "elected" Board of Directors and the first Trustee or Trustees shall be selected.

(b). Advisory Members: Any Director of the "Founder Members" Board of Directors, or any "Managing Member" who shall have served for two or more consecutive terms on the Board of Directors of this Church, shall be eligible to become an "Advisory Member" upon designation of a majority of Managing Members of the Church and the approval of the Trustee, or Trustees, of the Church.

The Advisory Members shall be consulted by the Board of Directors on all matters constituting any distinct (or precedent-establishing) matter of policy or change of policy for the Church and their written recommendations shall be given due consideration by the Board before any final action upon such matters of policy (or such other precedent-establishing matters) as may come before said Board of Directors.



The Advisory Members shall elect from amongst their number annually a Chairman who shall either preside at all of their meetings or appoint another Advisory Member to preside during his or her absence—or when desired. In event of the failure of the Advisory Member to preside over the meeting, or to appoint a chairman to preside in his place, the remaining members may elect a temporary chairman.

Committees consisting of Advisory Members, who have had extensive experience in the same or similar specific branches of our Church's varied activities and interests, shall be formed for the purpose of assisting the Board of Directors whenever requested to do so by said Board and/or by the Trustee, or Trustees, or whenever a majority of the Members of such Advisory Committee, or Committees, believe that their assistance would be of value; then such recommendations as a majority of the members of any such committee determines to be of value, and for the best interests of the Church, shall be sent in written form to the Board of Directors and a copy to the Trustee, or Trustees—a copy thereof shall also be permanently retained in the files of said committee and an additional copy in the general files of the Secretary to the Advisory Members.

(c). Managing Members: Managing Members are those persons who are appointed by the Board of Directors and/or the Trustee or Trustees to serve until the first annual meeting following the date of their appointment or who are elected (in accordance with the following paragraph) to manage or direct the different service, educational, missionary and business enterprises of the Church . . . such persons shall remain Managing Members only so long as they comply with the qualifications of this classification and only so long as they meet



the responsibilities of their respective positions to the satisfaction of the Board of Directors and/or the Trustee, or Trustees.

Managing Members shall be elected annually—thirty days prior to the Annual Meeting of the Managing Members—either by the Board of Directors (subject to the written approval of the Trustee or Trustees) or by a majority vote of the Project Members of each of the different respective service, educational, missionary or business enterprises of the Church, subject to the approval of the Board of Directors and/or the Trustee, or Trustees.

It shall be incumbent upon the Board of Directors, before approving the action of the Project Members in electing one of their number to membership in the classification of Managing Member, to endeavor to ascertain that there shall be selected the most loyal, industrious, competent and successful Project Member from the respective service, education, missionary or business enterprise.

(d.) Project Members: Project Members shall be appointed by the Board of Directors and/or the Trustee, or Trustees, to serve until the first annual meeting following the date of their appointment, or shall be recommended for this classification by not less than three (3) of the Initiate Members—(subject to the approval of the Board of Directors and/or Trustee, or Trustees)—and each Project Member shall retain this classification only so long as he complies with the qualifications of this classification and only so long as he meets the responsibilities of his respective position to the satisfaction of the Board of Directors and/or the Trustee, or Trustees.

(e). Initiate Members: Initiate Members are those persons over fifteen (15) years of age who have been

admitted to membership and who have signed Application Form #1 of this Church pledging themselves to be bound by the term and conditions recited in said Form and who shall be responsible for recommending from their number,—(subject to the approval of the Board of Directors and/or the Trustee, or Trustees)—the Project Members. If applicant is a minor, the written approval of both parents (and/or legal guardian) must be secured before applicant may become a Member.

An Initiate Member shall retain this classification only so long as he maintains the qualifications of this classification as outlined in said Membership Form #1.

Section 3. Application for Membership: Each person, after June 1, 1944, who desires to become a Member of this Church, shall sign an application for membership form #1 and shall agree thereby to be bound by all of the terms and conditions of membership as the same are enunciated in the Application for Membership, the By-Laws and the Church Charter. Such application shall be sponsored by two Members in good and regular standing and shall be forwarded to the Secretary of the Church for action by the Board of Directors. Such application shall be considered by the Board at the next meeting called for such purpose and, if the applicant is determined by the Board to be acceptable for membership, the Secretary shall thereupon forward said application to the Trustee, or Trustees, for final approval, having first noted thereon the action of the Board.

Section 4. Fulfillment of Membership Obligation: After June 1, 1944, each Member shall—within not to exceed ninety (90) days from notification of acceptance to membership—proceed to fulfill the obligations of membership as set forth in the application.

## ARTICLE III—MEETINGS OF MANAGING MEMBERS

Section 1. Place of Meeting: The annual meetings of the Managing Members of the Church shall be held at the principal office of the Corporation or at any other place within or without the State of California which may be designated either by the Trustee, or Trustees, pursuant to authority granted by the Articles of Incorporation, or by the written consent of a majority of all Managing Members entitled to vote thereat given before the meeting (subject to the written consent of the Trustee or Trustees) and filed with the Secretary of the Corporation.

Section 2. Annual Meetings: The Annual Meetings of the Managing Members shall be held (starting in July, 1945), on the second Monday of July of each year at 10:00 o'clock A. M. of said day. Written notice of each annual meeting shall be given to each Managing Member entitled to vote thereat not less than ten (10) days before each annual meeting. Said notices are to be sent by Registered Mail—Deliver to Addressee only—Return Receipt Requested, or should be handed to them personally, in which event, signed acknowledgment of such delivery is to be obtained from said Managing Member, or Members, by the person presenting such announcement.

Section 3. Special Meetings: Special Meetings of the Managing Members may be called at any time by the Trustee, or Trustees, or by seven or more Managing Members of the Corporation with the written consent of the Trustee, or Trustees.

Section 4. Voting: At all meetings of the Managing Members each shall be entitled to one vote. No proxy voting shall be permitted.

Section 5. Quorum: A quorum at any meeting of the Managing Members shall exist when more than fifty per-

cent (50%) of the Managing Members of the Corporation are present in person. Either a Trustee, if he so desires, or a Managing Member (elected by a majority of those present) shall preside.

#### ARTICLE IV—DISCIPLINE OF MEMBERS

Section 1. Authority. The Board of Directors and/or the Trustee or Trustees only of "Christ's Church of The Golden Rule" shall have the power to discipline, place on probation, remove from membership, or to ex-communicate Members of the Church. Only members of the Board of Directors and/or the Trustee, or Trustees, shall be present at meetings for the examination of complaints against Church Members, and they alone shall vote on cases involving Church discipline.

Section 2. Preliminary Requirement: No Church discipline shall ensue until the requirements according to the Scripture in Matthew 18: 15-17, have been strictly obeyed, unless a By-Law governing the case provides for immediate action.

Section 3. Procedure: A written complaint against a member of the Church shall be laid before the Board of Directors and within ten (10) days thereafter the Secretary of the Church shall address a letter of inquiry to the member against whom such complaint is made as to the validity of the charge. A copy of the complaint and of this letter shall be sent to the Trustee, or Trustees. If a member be found guilty by a majority of the Board and or by the Trustee or Trustees, after a hearing on the complaint, the Board shall immediately proceed to discipline the member as provided herein.

Section 4. Grounds for Discipline: If a member of the Church shall depart from or violate the principles



upon which this Church is founded as enunciated in the Charter of the Church, the By-Laws and the Application for Membership, or if a member shall vilify or aggrieve the officers, Trustee or Trustees or members of the Church, and another member in good standing shall, from Christian motives, make this evident to a Committee of the Board of Directors appointed for this purpose, and the Committee—after due investigation—find the charge against the member such as to warrant disciplinary action, the matter shall then be certified to the Board of Directors for disciplinary action in accordance with the By-Laws.

## ARTICLE V

### DIRECTORS

Section 1. Powers: Subject to the limitations of the Articles of Incorporation, of the By-Laws and the laws of the State of California relating to religious non-profit corporations in accordance with the conditions specified in the Articles of Incorporation, all corporate powers shall be exercised by, or under the authority of, and the business affairs of the Corporation shall be controlled by the Board of Directors provided, however, that the Board of Directors shall not legally obligate the Church by the sale, hypothecation or incumbering of any of the real or personal property or income or other resources of the Church, nor—(unless previously approved by the Trustee or Trustees)—by purchases or expenditures in excess of \$5000.00 during any one month, without first obtaining the express approval of the Trustee, or Trustees, such approval to be in writing and acknowledged before a Notary Public.

Section 2. Duties: It shall be “forever” the duty of the Board of Directors, who are charged with the man-

agement and direction of this Church, to militantly—and in the spirit of true Christian crusaders—carry out the objectives for which this Church is created as set out in the original Articles of Incorporation (a copy of which is made a part hereof) and to that end they shall “forever” endeavor to provide adequate and ever increasingly efficient facilities for the care, maintenance and the general and spiritual welfare, education and progress of the members of this Church which shall include places of educational employment and places of residence (which shall also constitute their principal churches) . . . provisions shall also be made for general institutions of learning and for places of amusement, resorts, rest homes and sanitariums . . . to the end that God may be increasingly glorified by the ever-enlarging capacities of His children to express loving kindness, consideration and concern for the happiness of each and every one of his children, . . . and progressive effort toward these objectives shall be the only justification for any member of the Board of Directors being continued in office—remembering, always, however, that God is glorified by “joyous” inspired efforts, but never by struggle nor strife.

Section 3. Number and Qualification: The authorized number of directors of the corporation shall be three (3), until changed by a by-law amending this Section 3, of Article V of these By-Laws, duly adopted by the vote or written assents of the majority of the Managing Members entitled to exercise the voting power of the corporation and subject to the written consent of the Trustee, or Trustees, acknowledged before a notary public. The Founder Members’ signature on a copy of these By-Laws shall constitute their acceptance and approval of these By-Laws.

Section 4. Election and Term of Office: The first elected Board of Directors shall be elected by the Founder-Members from amongst their number. Thereafter all Directors shall be elected by and from the Managing Members, subject to the written, notarized approval of the Trustee, or Trustees. All Directors shall hold office for one (1) year unless reelected, or until their respective successors are elected. No Director shall hold office for more than three (3) years.

Section 5. Vacancies: Subject to the written approval of the Trustee, or Trustees, vacancies in the Board of Directors may be filled from the ranks of the Managing Members for the unexpired term by a majority vote of the remaining directors if a quorum be present. If, for any reason whatsoever, the number of remaining directors shall be less than a quorum, a special meeting of Managing Members shall be called to fill the vacancy on the Board of Directors, as provided in Article III, Section 3 hereof. No reduction of the authorized number of directors shall have the effect of removing any director prior to the expiration of his term of office.

Section 6. Removal: If the authorized number of directors shall be three (3), a director may be removed by a two-third's vote of the Board of Directors with the written approval of the Trustee, or Trustees. If the Board of Directors be five (5), or more than five (5), a director may be removed only upon an eighty per cent (80%) vote of the Board of Directors and with the written approval of the Trustee, or Trustees.

Section 7. Place of Meeting: Regular meetings of the Board of Directors shall be held at the principal office of the Corporation, provided, however that the organization meeting, and any other directors' meeting of the corpora-

tion, may be held at any place within or without the State of California which has been designated by resolution of the Board of Directors or by the written consent of a majority of the members of the Board, subject to the written approval of the Trustee, or Trustees, acknowledged before a notary public.

Section 8. Time of Meeting: Regular meetings of the Board of Directors shall be held without call on the second Tuesday of January, April, July and October of each year, at 2:00 o'clock P. M. (starting in January, 1945).

Section 9. Special Meetings: Special Meetings of the Board of Directors may be called at any time by the Trustee, or Trustees, of the Corporation or by a majority vote of said Board with the written approval of the Trustee, or Trustees.

Section 10. Quorum. A majority of the authorized number of Directors shall be necessary to constitute a quorum for the transaction of business.

## ARTICLE VI

### TRUSTEE

Section 1. Appointment: Pursuant to the powers conferred upon the Founder-Members of the Corporation by Article V of the Articles of Incorporation, the Founder-Members shall appoint a Trustee, or Trustees, who shall thereafter have the power to appoint his, her or their successor, or successors, in whatever manner said Trustee, or Trustees, may select, by agreement, will or otherwise, providing that the instrument by which said successor Trustee, or Trustees, is or are appointed shall be acknowledged before three notaries public at the time said instrument is signed by the Trustee, or Trustees.



Section 2. Powers: The Trustee, or Trustees, of the corporation shall have the full and complete power (subject to his, her, or their sole discretion) to approve or disapprove any and all actions of the Board of Directors or of the officers of the corporation, such approval or disapproval to be in writing over the signature of the Trustee, or Trustees, and to be acknowledged before a Notary public. If any action be taken by the corporation, its officers or directors without first obtaining the express written approval of the Trustee, or Trustees, as hereinabove mentioned, such action shall be null and void unless subsequently ratified by the Trustee, or Trustees, in the same manner as his, her or their approval would have been given.

Section 3. Privileges and Duties: It shall be the privilege of the Trustee, or Trustees, to attend any and all meetings of the Board of Directors, also the regular and/or special meetings of the Managing Members, and the Trustee, or Trustees, shall have the right to vote (and it shall be his, her or their duty to vote) at any of the aforesaid meetings when the Board of Directors' or the Managing Members' votes are equally divided.

## ARTICLE VII

### OFFICERS

Section 1. Number and Designation: The officers of the corporation shall be a President, a Vice-President, a Treasurer and a Secretary.

Section 2. Election: The officers of the corporation shall be selected from the Board of Directors and shall be chosen annually by the Board of Directors . . . each shall hold office until his successor shall be elected and qualified.

Section 3. Removal: Any officer may be removed either with or without cause by the Trustee, or Trustees, or by a majority of the Directors with the approval of the Trustee, or Trustees.

Any officer or member may resign his or her office or may withdraw his or her membership from this Church at any time by giving written notice to the Board of Directors, and/or to the Trustee, or Trustees, of the corporation; but any such resignation or withdrawal of membership, shall take effect only upon the date of acceptance by the Board of Directors and/or the Trustee, or Trustees. Written notice of acceptance of such resignation, or withdrawal of membership, shall be necessary to make it effective. However, if such resignation is protested by a majority vote of the Board of Directors (and/or the Trustee, or Trustees)—although finally accepted by them—the officer or member tendering such resignation, or withdrawal of membership, shall—(upon such protest)—never again be eligible as an Advisory Member, an officer or a member of this Church.

Section 4. President: Subject to the supervisory powers conferred upon the Trustee, or Trustees, of this corporation by the Articles of Incorporation and these By-Laws, the President shall be the chief executive officer of the corporation. Either he, the Vice-President or a Trustee shall preside at all meetings of the Board of Directors.

Section 5. Vice-President: Subject to the supervisory powers conferred upon the Trustee, or Trustees, of this corporation by the Articles of Incorporation and these By-Laws, the Vice-President in the absence or disability of the President, shall perform all duties of the President.

Section 6. Secretary: The Secretary shall keep, or cause to be kept at the principal office of the corporation, or at such other place, or places, as may be approved by the Trustee, or Trustees, a Book of Minutes for the corporation.

Section 7. Treasurer: The Treasurer shall keep, or cause to be kept, accurate books of account at such place, or places, as shall be approved in writing by the Board of Directors and/or the Trustee, or Trustees.

## ARTICLE VIII

### MISCELLANEOUS

Section 1. Indemnification of Directors: Every person who now is, or hereafter shall be a Director, Trustee or officer of the Corporation shall and is hereby indemnified by the Corporation against all costs and expenses (including counsel fees) hereafter reasonably incurred by or imposed upon him in connection with or resulting from any action, suit, or proceedings, of whatever nature, and whether or not concluded, dismissed or otherwise terminated, or by compromise settlement, to which he is or shall be made a party by reason of his being, or having been, a Director, Trustee or officer of the Corporation, or a director or officer of any corporation or association in which this Corporation owns voting securities, except in relation to matters, (a) as to which he shall be finally adjudged in such action, suit or proceedings to have been derelict in the performance of his duty as such directors or officer, or (b) with respect to which he has been guilty of wilful misfeasance, bad faith, gross negligence or reckless disregard of his duties.

The foregoing right of indemnification shall exist whether or not such Director, Trustee or officer at the

time he is made a party to such action, suit or proceedings, or at the time such costs or expenses are incurred by or imposed upon him, is a Director, Trustee or officer of this Corporation or of a corporation in which this Corporation owns voting securities, and shall not be exclusive of other rights to which he may now or hereafter be entitled as a matter of law.

Section 2. Co-Workers: The Board of Directors shall make provision for accepting and recognizing the cooperation and assistance of those who—(though qualified to receive all of the benefits from the activities of this Church not restricted to the specific membership classifications described herein)—for reasons of their own, or conditions beyond their control, have not become members of this Church—such persons shall be designated as “Co-Workers”.

## ARTICLE IX

### AMENDMENTS

Section 1. Power to Amend Articles of Incorporation: The Articles of Incorporation of this Corporation may be amended and/or repealed only in accordance with its original Articles of Incorporation.

Section 2. Power to Amend By-Laws: The Board of Directors, subject to the written approval of the Trustee, or Trustees, acknowledged before a Notary Public, shall have the power, upon majority vote of said Board, to amend the By-Laws.

Case No. 44128 Re Christ's Church of Golden Rule  
Petitioner's Exhibit 1 Date 11-13-45 No. 1 In Evidence  
Clerk, U. S. District Court, Sou. Dist. of Calif. Louis J.  
Somers, Deputy Clerk



## [TITLE OF COURT AND CAUSE.]

## SECOND ACCOUNT AND REPORT OF TRUSTEES.

## APPLICATION OF TRUSTEES FOR COMPENSATION.

Paul W. Sampsell, L. Boteler and Stewart McKee, the Trustees in Bankruptcy of this estate until April 8, 1947, as hereinafter indicated, present herewith the second account and report of Trustees to cover matters up to April 8, 1947, when the resignation of Trustee McKee was accepted by the court and McIntyre Faries was appointed and qualified to fill the vacancy thus created.

This bankruptcy proceeding commenced on Nov. 1, 1945, as an arrangement case under Chap. XI of the National Bankruptcy Act of 1898. Thereafter, and in the same case, the above named corporation was adjudicated a bankrupt and further proceedings in the administration of the estate were referred to Benno M. Brink, a referee in bankruptcy of the court. On Nov. 20, 1945, Paul W. Sampsell, J. Ray Files and Stewart McKee were appointed and qualified by the court as primary receivers in bankruptcy. Ancillary proceedings were instituted and prosecuted in the Northern District of California and in the District of Oregon. The ancillary proceedings in Northern California were referred for administration to Referee in Bankruptcy Burton J. Wyman of San Francisco. Those in Oregon were referred to Referee in Bankruptcy Estes Snedecor, of Portland. Wm. C. Mikulich and Paul W. Sampsell were appointed and qualified as Ancillary Receivers for the Northern District of California. Harry Skyrman and Paul W. Sampsell were appointed and qualified as Ancillary Receivers for the District of Oregon. On January 4, 1946, Paul W. Sampsell, L. Boteler and Stewart McKee were appointed Trustees

in Bankruptcy of the estate with the approval of Referee Brink, and they qualified on January 5, 1946. They acted as such Trustees until April 8, 1947, when the resignation of Trustee McKee was accepted and McIntyre Faries was appointed, with the approval of Referee Brink, as Trustee, to fill the vacancy thus created, and qualified.

The bankrupt's original schedules were filed December 4, 1945. Amended schedules were filed December 17, 1945, and March 17, 1946. Those filed March 17, 1946, are the most comprehensive of the three and contain the most information regarding the assets of the estate. The trustees took over the custody of the property of the estate in the Southern District of California from the Primary Receivers on January 5, 1946, and in Oregon from the Ancillary Receivers there on the same date, but did not take over the custody of the property in the Northern District of California until February 18, 1946, at 10:00 A. M. pursuant to a specific order of that court. Both sets of ancillary receivers have filed, and had allowed, their final accounts and reports in their specific districts, the accompanying applications in both cases being allowed in full, as requested. Reference is made to same for particulars thereof.

The primary receivers filed and had allowed their final accounts and reports and an allowance on account for compensation was ordered and paid. Reference is made to the same for further particulars.

The Trustees filed and had allowed their first account and report. Also the Trustees' first application was allowed and the Referee ordered a payment for compensation on account, and the same was paid. Reference is made to the same for further particulars.

The Trustees applied for authority to employ as their counsel Craig & Weller, Martin Gendel and Irving M. Walker. The employment of Irving M. Walker was authorized by the Referee.

The proposed employment of Craig & Weller and Martin Gendel was disapproved by the Referee. Craig and Weller and Martin Gendel and the Trustees then filed a petition for a review of the order of disapproval, but the order was affirmed by the District Judge. Upon appeal to the Circuit Court of Appeals for the Ninth Circuit from the said order of the District Judge, the said order was reversed and the matter remanded to the Referee for a further hearing. Upon such further hearing, the said Craig and Weller and Martin Gendel were again disqualified by the Referee. The Trustees and Craig and Weller and Martin Gendel then filed a petition for a review of this last order and the same is now pending for decision before the District Judge. In the beginning, Grainger and Hunt were employed, with the approval of the Referee, as interim counsel, pending the determination of the litigation over the disqualification of Craig and Weller and Martin Gendel. On April 8, 1947, Irving M. Walker retired as counsel for the Trustees, such retirement to take effect as of April 15, 1947.

Irving M. Walker and Grainger and Hunt filed herein their first application for compensation and were allowed fees on account; and will shortly file herein their second application which will request compensation in full for their services from the beginning to April 8, 1947. Just now, therefore, Grainger and Hunt are the sole counsel for the Trustees.

When bankruptcy commenced, the Church corporation owned a large amount of real and personal property of a



value in excess of a million dollars; and was engaged in operating in California and Oregon many business projects such as ranches, hotels, office buildings, apartment houses, club buildings, garages, parking lots, sawmills, iron works, hardware stores, lumber yards, bulb gardens, cheese factories, fish hatcheries, etc. Under the control and supervision of the court. the Trustees proceeded to liquidate and reduce to cash some of these properties and to continue the operation of others. Most of the properties were covered by liens; and there were many title troubles. The Church was a religious non-profit corporation organized under the California laws. The scheme followed was for its members to donate all of their property, real and personal, to the Church and thereafter work in common for the Church's interest, both religious and economic, by donating their services in connection with such business enterprises, without the payment of wages and merely for their board, room and personal maintenance. Each project was handled by a project manager. Under Court orders, the Trustees followed the same scheme for some months.

It later developed that the Trustees could not operate most of these business projects except at a loss; and so the court directed by its order of Sept. 17, 1946, that they be shut down on or before Sept. 30, 1946, except wherever it appeared advisable to keep the business in operation pending a favorable sale thereof. A general liquidation of the assets of the estate was also ordered. On Oct. 10, 1946, the court made an order directing the Trustees to sell practically all of the property of the estate. Thereupon a committee representing certain members, associates and affiliates of the Church, known as the "Loyalist" group, filed a petition for a review of this order of the Referee. The review is still pending. The Trustees ceased



to operate nearly all of the business projects, but retained a few upon the basis of either paying wages to those who worked upon the project or providing for the operation by an independent contractor who would pay wages. The only projects now remaining in operation are:

(1) Petaluma Laundry, Petaluma, Calif., operated by Frank Rusalem as an independent contractor under contract whereby the estate received a percentage of the net profits. The continued operation of this project has produced a substantial income for the estate.

(2) American Laundry, San Jose, California, is operated by the Trustees. The income from this project has dwindled to such a low point that the Referee has directed that the project be closed unless some satisfactory lease arrangement is made whereby the estate will receive a substantial income per month.

(3) Petersen's Cafe, 4962 East Slauson Ave., Maywood, Calif., operated by Peter Petersen. He claims title to this property adverse to the Trustees, although they have been operating the restaurant. Litigation is pending before the Referee with respect thereto. The returns from the operations have dwindled to such a point that the Referee has directed that the project be closed unless some satisfactory lease arrangement is made pending the outcome of the litigation.

(4) Riker's, Your Foods Fountain, San Bernardino, Calif. The situation here is the same as in No. 3 above (Petersen's Cafe).

(5) Hillcrest Bulb Gardens, Grants Pass, Oregon. As related in the Trustees' first report a new contract with Henry G. Plummer, the lien holder, was negotiated; this unit consists of a hotel, two warehouses, a residence, a

ranch, machinery and equipment, accounts receivable, bulbs in the ground, and a stock of gladiola bulbs. Under the contract referred to, clear title to these properties was established in the estate subject to a large mortgage covering the balance due Plummer under his contract with the Church. Plummer had sold the property under conditional sales arrangement to the Church, and until late date has managed the property for this estate. The present encumbrance amount is approximately \$169,993.16, and there are \$48,056.56 in accounts receivable, of which the largest proportion appears collectible. At the present time the Trustees are using Mr. Plummer's nephew to manage the properties and have planted a new crop to maintain going business value. The Trustees have been notified that Henry G. Plummer's interest in this mortgage has been assigned to Messrs. Hannon and Weinberg, who are handling ranches in the Imperial Valley for the Trustees under a somewhat similar arrangement. It appearing that the bulb market is strongly off from the war years, the speculative quality of the operation has increased and the Trustees intend to resolve the operational problem in the near future, before too much current expense is incurred on the new crop.

The Trustees have liquidated and reduced to cash many of the properties of the estate. In this connection, the Trustees wish to call attention to the fact that in connection with the sales of the Oregon properties, they conducted after notice to creditors, and with the aid of the Referee in Bankruptcy in the ancillary proceedings in Oregon, a general sale of all of the assets held by the estate in the State of Oregon, which sale was held at Medford, Oregon, in February, 1947. Competitive bidding was had at the sale, with the result that only two

items of property were bid to such a level as to be deemed by the Trustees to be a reasonable price. These items were (a) Ladino Cheese Factory, Eagle Point, Jackson County, Oregon, and (b) Lot and Sheds in Eagle Point, Jackson County, Oregon.

A list of the properties liquidated and reduced to cash is as follows:

Southern California

- ( 1) Office and store building, 333-337½ South Hill Street, Los Angeles.
- ( 2) Continental office building, 408 South Spring Street, Los Angeles.
- ( 3) West Adams Gardens apartments, 2619 West Adams Gardens, Los Angeles.
- ( 4) California Bank Building, 163 Marine Street, Ocean Park.
- ( 5) Santa Monica Athletic Club, 1441 Ocean Front, Santa Monica.
- ( 6) Sorrento Beach Club, 808 Ocean Front, Santa Monica.
- ( 7) Tip Top Hotel, 626 Azusa Avenue, Azusa, Calif.
- ( 8) Your Laundry, 5600 Atlantic Boulevard, Maywood.
- ( 9) Residence, 4516 East 56th Street, Maywood.
- (10) Casa Blanca Hotel, 210 South Fern Avenue, Ontario.
- (11) Lot 55, Tract 7737, adjoining 8440 Carlton Way, Los Angeles.
- (12) Ocean Park flats and stores, 201-218 Marine Avenue, and 3101-3 Main Street, Ocean Park.

- (13) Bakery fixtures and equipment, 1032 North Highland Avenue, Los Angeles.
- (14) Lot, 1427 South Garvey Boulevard, Pomona.
- (15) Eight Ranches, Imperial Valley, near Brawley. (Sale of 4 of them consummated subsequent to April 8, 1947.)
- (16) Campus Hotel, 527 "D" Street, Brawley.
- (17) Plaza Apartments, 123 North Plaza Street, Brawley.
- (18) Five vacant lots, Third and "C" Streets, Brawley. (Lots 1, 2, 3, 4 and 5, Block 49.)
- (19) Stratford Hotel, 2629 West 8th Street, and flats 751-63 South Coronado Street, and residence 745 South Coronado Street, Los Angeles.

#### Northern California

- ( 1) Kean Hotel and Herbst Parking Lot adjoining, 1019 Mission Street, San Francisco, Cal.
- ( 2) Residence, 3827 Clement Street, San Francisco.
- ( 3) Residence, 952-4 Ashbury Street, San Francisco.
- ( 4) Residence, 595 Victoria Street, San Francisco.
- ( 5) Golden Rule Bakery, equipment and fixtures, 900 Bush Street, San Francisco.
- ( 6) Denman Garage, equipment and stock in trade, 902 Bush Street, San Francisco.
- ( 7) Lots 20 and 30, Foothill Boulevard Terrace, Oakland.
- ( 8) Rancho Dos Palmas, Santa Clara County, near San Jose.
- ( 9) Palomarin Rancho, Bolinas, Marin County, Calif.
- (10) Store building and fixtures, 3072 Bayshore Drive, San Mateo County, near Redwood City.



- (11) Ziegler's Creamery, Marina, near Monterey, Monterey County.
- (12) Lot 9, Block 344, Pinehurst, Pacific Grove, Monterey County.
- (13) Denton-James Sawmill near Willets, Mendocino County.
- (14) Parking Lot, 429 Mason Street, San Francisco.
- (15) Residence, 3820 Maybelle Avenue, Oakland, California.
- (16) Residence ( $\frac{1}{2}$  interest), 4000 Greenwood Street, Oakland.
- (17) Residence, 4220 Midvale Street, Oakland, Calif.
- (18) Residence, 2462 Kinsland Avenue, Oakland.
- (19) Residence, Fallon House, Petaluma.

### Oregon

- ( 1 ) Ladino Cheese Factory, Eagle Point, Jackson County.

The properties remaining unsold and apparently not subject to reclamation proceedings by individuals are the following:

### Southern California

- ( 1 ) Homesteaders' Life Building, 845 South Figueroa Street, Los Angeles, California.
- ( 2 ) Wavecrest Club, 1351 Ocean Front, Santa Monica.
- ( 3 ) Equipment of Beach Machine Shop, 216 Marine Avenue, Ocean Park.

Northern California

- ( 1 ) Seminary, 801 Silver Avenue, San Francisco.
- ( 2 ) Warehouse, 830 Folsom Street, San Francisco.
- ( 3 ) Warehouse, 70 Mary Street, San Francisco.
- ( 4 ) American Laundry, 585 East Empire Street, San Jose.
- ( 5 ) Residence, 364 South Fifth Street, San Jose.
- ( 6 ) Residence, 68 South Tenth Street, San Jose.
- ( 7 ) Residence, 64 South Tenth Street, San Jose.
- ( 8 ) Residence, 456 North Third Street, San Jose.
- ( 9 ) Residence, 67 South Fifth Street, San Jose.
- (10) Residence, 795 East Seventh Street, Redwood City.
- (11) Petaluma Laundry, Petaluma, Sonoma County.

Oregon

- ( 1 ) Hanley Ranch and equipment, Jackson County.
- ( 2 ) Residence at Eagle Point, Jackson County.
- ( 3 ) Galbreath Auto Court, Eagle Point, Jackson County.
- ( 4 ) Hillcrest Bulb Gardens, Grants Pass, Josephine County, consisting of Grants Pass Hotel, two warehouses and equipment, one in Grants Pass and the other on the Redwood Highway near Grants Pass, residence and equipment on Redwood Highway, New Hope Ranch and equipment near Redwood Highway, accounts receivable, and stock of gladiola bulbs.
- ( 5 ) Automotive equipment located at New Hope Ranch.
- ( 6 ) Livestock—cows and horses—located upon Hanley Ranch.

- ( 7 ) Miscellaneous rolling stock and equipment.
- ( 8 ) Little Butte Creek Hydro-Electric Power Plant, located on Hanley Ranch.

There are some properties listed as assets in the bankrupt's amended schedules filed March 17, 1946, titles to which have not yet been questioned, but which appear to have little or no value. These are:

- ( 1 ) Salmon Lake Resort, Sierra City, Calif. The schedules state that the Church has not any clear title to the property and that the former owner held only a mining claim.
- ( 2 ) Shady Nook Ranch, Colfax, Calif.

There are certain properties to which the Trustees claim title and possession, but such claims are questioned by former owners and are in litigation:

- ( 1 ) Residence, 8433 Harold Way, Los Angeles. Claimed by Ruby V. Chapman, the wife of Arthur L. Bell, the President of the bankrupt corporation.
- ( 2 ) Petersen's Cafe, Los Angeles. Claimed by Peter Petersen, a Church member.
- ( 3 ) Your Foods Fountain, San Bernardino. Claimed by Peggy Lou Riker, a Church member—Robert L. Riker, a former Church member.
- ( 4 ) Residence, 10 Hillside Circle, Burlingame, San Mateo County. Claimed by Ruby V. Chapman, the wife of Arthur L. Bell, the President of the bankrupt corporation.
- ( 5 ) Residence, 281 Granada Street, San Francisco. Claimed by Louis J. Glenn and wife, Church members.

- ( 6) Ace Iron Works, 9-12 Decatur Street, San Francisco. Claimed by Hans Brand, a Church member.
- ( 7) Papenhausen Hardware Store, 32 West Portal, San Francisco. Claimed by Henry Papenhausen, a Church member.
- ( 8) Placer County Co-Operative Lumber Company, sawmill, Forest Hill, Placer County. Claimed by August Ebbert and wife, Church members.
- ( 9) Proceeds of sale of plumbing supplies upon Hanley Ranch in Jackson County, Oregon, claimed by Geo. D. Patrick.
- (10) Rolling stock—autos, trucks, etc.—about 150 in number, scattered throughout California and Oregon. Claimed by Church members.
- (11) Furniture and household equipment stored in the warehouses at 830 Folsom Street and 70 Mary Street, San Francisco. Claimed by Church members.
- (12) Allegretti property, Casino Garage—store, garage and residence, 2135-41 35th Avenue, Oakland.
- (13) Residence, 1615 Lincoln Avenue, Berkeley. Claimed by Mr. and Mrs. Cooley, former Church members.
- (14) Residences at 450 and 452 62nd Street, Oakland. Claimed by Mr. and Mrs. Thomas, Church members.

The bankrupt claimed title to the Kimball Cannery, and a residence adjoining, in Redlands. But investigation disclosed that the estate had little, if any, equity in property and title thereto was abandoned by order of court. The



Trustees claimed title to residence property in Redwood City formerly owned by Nellie Paget, but she disputed the title and litigation followed; this resulted in a compromise where the property was deeded back to her by the Trustees upon the payment by her of a sum of money, which compromise was approved by the court.

The bankrupt's amended schedules (Supplement No. 4 to Schedule B-1), filed Mar. 17, 1946, disclosed a list of some 105 miscellaneous properties, consisting of ranches, homes and vacant lots scattered throughout California and elsewhere. Title to the properties had been conveyed to the Church but the bankrupt claimed it had not formally accepted the deeds and did not set up these properties as assets of the Church, although the deeds to the same had been recorded. The Trustees, under court instructions, have not yet taken over, or attempted to take over, actual possession of these properties, or paid taxes thereon, or commenced any proceedings with reference to the title thereto. It has been felt that action as to these properties, under the circumstances, should be deferred until it appeared that the estate itself was insolvent and an endeavor was necessary to realize something from these particular properties. The litigation that would probably follow if any attempt were made to take over these properties would probably be long and expensive.

The bankrupt recently instituted, and is now prosecuting, proceedings under Chap. XI of the Bankruptcy Act for an arrangement with its creditors. The case was referred to Referee Brink by the District Judge for further proceedings; and the arrangement proposed by the bankrupt has been accepted in writing by creditors holding the required number and amount of claims. Confirmation is being deferred, however, until it is ascertained how much

money must be deposited to cover priority claims and expenses of administration. The only priority claims are those of the federal and state governments for taxes for the calendar years 1944 and 1945. These have been filed for very large amounts: The federal government for nearly \$1,250,000.00 and the state government for some \$350,000.00. The Trustees' counsel prepared and filed objections to the allowance of these claims. The objections were partially heard and the Referee made tentative oral rulings thereon. The hearing was then adjourned until the official auditors of the estate, in co-operation with a federal revenue agent, could obtain all the facts and figures. This investigation has been completed; and it indicates that the actual amount of taxes allowable as priority claims against the estate will be greatly less than the face of these claims, and it may be that the claims could be disallowed altogether. However, in view of the long expense and delay that would probably be involved in litigation over the claims, the Referee has authorized the Trustees to negotiate with the federal government for a settlement of their claims on the basis of \$125,000.00, at 6% per annum from Mar. 15, 1946, and with the state government for a settlement of their claims upon a basis later to be determined by the Referee. The results of sales of properties by the Trustees were such that nearly \$600,000.00 profit was realized over and above the original cost. The estate will probably be liable for capital gains taxes, federal and state, by reason thereof for the calendar years 1946 and 1947. There will probably not be any income taxes due owing to losses in the operation of the bankrupt's business.

The creditors who have filed claims against the estate are divided into the following classes: (1) secured; (2)

priority; (3) general; (4) claims presented by former members of the Church who are usually designated as "Dissenters"; and (5) claims filed by members of the Church who are usually designated as "Loyalists." It is conceded that Classes (4) and (5) must be deferred in payment until all allowed expenses of administration, and allowed claims of Classes (1), (2) and (3) have been paid; and that Class (4) takes precedence over Class (5). Claims in Classes (1), (2) and (3) have been fixed and allowed or disallowed after consideration by the Referee of objections presented by the Trustees through their counsel. Objections to claims in Classes (4) and (5) have not yet been presented to the Referee for consideration. If the tax claims are substantially reduced in their allowance, the probability is that the estate itself will be solvent and there will be a surplus available for distribution to the allowed claims of Classes (4) and (5). It appears now, from all indications, however, that a fund of from \$750,000.00 to \$1,000,000.00 will be required to satisfy allowed expenses of administration and allowed claims of Classes (1), (2), (3) and (4). The Trustees have on hand, or in contemplation from pending sales and escrows, about \$600,000.00. It is necessary that liquidation of more properties of the estate be continued for some time. The persons involved in Class (5) have been carrying on litigation before the District Judge with respect to requiring the Trustees to either suspend litigation until the tax claims are determined, or to sell in a certain sequence. The District Judge recently denied the petition of these persons to accomplish this end; and they contemplate an appeal to the Circuit Court of Appeals for the Ninth Circuit for this purpose.

Many petitions in reclamation have been filed and prosecuted relating to properties standing in the name of the



Church based upon alleged fraud, failure of consideration, etc. Many have been granted. Others are still in litigation. The files of the Referee disclose the details and proceedings relative to such proceedings. Referee Brink rendered a decision in the so-called "White Case," wherein he held that the Church had acquired the White property through the fraud of the bankrupt and Arthur L. Bell, its President, and that there had been a failure of consideration. This White case has been the basis of many of these reclamation proceedings. The Referee's decision is on appeal.

The Trustees and their counsel have been engaged in constant and costly litigation ever since the commencement of their administration of the estate in January, 1946. Such litigation is increasing instead of abating. This litigation arises out of disputes over titles, petitions in reclamation, and efforts to prevent the closing down of the operation of the business and a general liquidation, all with members or former members of the Church. If the plan of arrangement is confirmed and consummated, it is anticipated that this litigation will largely cease, inasmuch as one of the objects of the plan is to terminate this liquidation as far as is possible. But, in the meantime, it is vitally necessary to the welfare of the estate that such litigation be pressed to a final conclusion by counsel for the Trustees.

The foregoing recital reflects generally the services of the Trustees. For many months they maintained an office at 836 Board of Trade Building, 111 West Seventh Street, Los Angeles; and lately moved the office to 215 Central Building, Sixth and Main Streets, Los Angeles. N. L. Nagler has acted as the Trustees' agent in Oregon; and John Costello and H. E. North, V. W. Erickson and



J. O. England, in succession, have acted as the Trustees' agent in Northern California; and Edwin Ridgway has acted as the Trustees' agent in Southern California and in connection with some matters in Oregon. Frank A. Reddall has acted as secretary for the Trustees. The Trustees have held frequent meetings, have kept files of all papers involved; and have endeavored to function the same as would a competent Board of Directors of a corporation who were engaged in temporarily operating a business and ultimately liquidating and reducing to cash the assets of that business and of the corporation. A. J. Kuhler has acted as office auditor for the Trustees. For a long time Bess A. Aldrich acted as bookkeeper for the Trustees. The official auditors for the estate, appointed by the court, are Arthur Young and Company, of 629 South Hill Street, Los Angeles. In the performance of their services the Trustees have been required to hold many conferences among themselves, and with their counsel, conduct a large volume of correspondence, interview many people and attend many court sessions. The Trustees divided up their work so that they acted together on major matters and questions of policy, but left minor details in Southern California to Trustee Boteler, in Northern California to Trustee Sampsell, and in Oregon and Imperial Valley to Trustee McKee.

The Trustees hold some \$30,000.00 in trust, awaiting the outcome of pending litigation over the title thereto between them and third persons. Trustees' Counsel have conducted extensive examinations under Sec. 21a of the

Bankruptcy Act of officers and agents of the bankrupt and others, endeavoring to locate any concealed or undisclosed assets. These examinations have not resulted in anything tangible. The Trustees and their counsel have found it to be extremely difficult, in many instances, to obtain information regarding the bankrupt's affairs from members, associates and affiliates. Early in the administration Arthur L. Bell, the bankrupt's President, circularized such members, associates and affiliates and instructed them not to give out any information to anyone and to let all information be channeled through him alone.

Attached hereto and made a part hereof is a statement of the cash receipts and disbursements of the Trustees since the filing of their first account and report and also a summary of the cash receipts and disbursements January 4, 1946, to April 8, 1947. This discloses that there has been received into the estate the total of \$2,721,085.12 and disbursed therefrom a total of \$2,169,698.85, leaving a balance on hand of \$551,386.27. The Trustees have received the sum of \$20,000.00 on account of their commissions under Sec. 48 of the Bankruptcy Act, which sum has been equally divided between them. They seek at this time a further allowance of \$23,533.97, based upon \$11,766.98 for ordinary compensation under Sec. 48c(1) of the Bankruptcy Act, and \$11,768.99 for extraordinary compensation arising out of the operation of the business, under Sec. 48c(2) of the Act.

Wherefore, Paul W. Sampsell, L. Boteler and Stewart McKee, as such Trustees, pray that this second account

and report be approved by the court, and Trustee McKee be discharged, and the compensation of the Trustees Sampsell, Boteler and McKee be fixed and allowed in full for all services to April 8, 1947, all after due notice to creditors; and for general relief.

Dated: May....., 1947.

L. BOTELE,  
PAUL W. SAMPSELL,  
STEWART MCKEE,  
*Trustees.*

GRAINGER AND HUNT,  
IRVING M. WALKER,  
By KYLE Z. GRAINGER,  
JOHN L. MARTIN,  
*Attorneys for Trustees.*

State of California, County of Los Angeles—ss.

Paul W. Sampsell, L. Boteler and Stewart McKee, being each first duly sworn, deposes and says, each for himself and not one for the other: I have read the foregoing second account and report and application for compensation; and the same is true to the best of my knowledge, information and belief.

Except as among ourselves, no agreement or understanding exists between any one of us and any other person for a division of compensation. No agreement, written or oral, express or implied, has been entered into between any one of us and any other party in interest, or any attorney of any other party in interest, for the purpose of fixing the amount of any fees or other compensation to be paid herein to any party in interest or any attorney of any other party in interest for services rendered in this case, either in violation of the so-called Borah Act of Congress of the United States of Aug. 25, 1937, or otherwise.

L. BOTELEK.

PAUL W. SAMPSELL.

STEWART MCKEE.

Subscribed and sworn to before me this 18 day of ~~May~~,  
(ink) June  
1947.

(Seal)

ADELE O. CARVER,

*Notary Public in and for the County of Los Angeles,  
State of California.*



CHRIST'S CHURCH OF THE GOLDEN RULE  
SUMMARY OF CASH RECEIPTS AND DISBURSEMENTS  
January 4, 1946—April 8, 1947

Receipts as per report		
Jan. 4—June 30, 1946	\$1,344,603.86	
Receipts as per report		
July 1, 1946—April 8, 1947	1,376,481.26	
		<hr/>
		\$2,721,085.12
Disbursements as per report		
Jan. 4—June 30, 1946	1,040,404.60	
Disbursements as per report		
July 1, 1946—April 8, 1947	1,129,294.25	
		<hr/>
		2,169,698.85
		<hr/>
Cash on hand April 8, 1947		\$ 551,386.27

SUMMARY OF CASH RECEIPTS AND DISBURSEMENTS  
July 1, 1946 to April 8, 1947

Cash balance previous report		\$ 304,199.26
<i>Receipts:</i>		
Project operations	\$ 360,808.07	
Sales of real and personal property	934,871.86	
Deposits on real estate bids and sales		
pending litigation	66,927.32	
Miscellaneous rentals	2,481.18	
Miscellaneous receipts	11,392.83	
		<hr/>
		1,376,481.26
		<hr/>
		\$1,680,680.52
<i>Disbursements:</i>		
Project operations	\$ 418,031.92	
Deposits on real estate bids and		
sales pending litigation		
returned by Trustees	75,495.69	
In connection with real estate		
sales, including liens on		
property sold	331,836.24	

Real estate and personal	
property taxes	20,796.20
Payment on real estate liens	65,165.52
Payment on personal property liens	3,184.07
Payment on prior claims	1,508.70
Appraisal fees	748.60
Court reporters' fees	4,173.05
Trustees' agents—salaries and expenses	28,320.86
Caretakers, inventories, State	
receivers, detectives—salaries	11,104.58
Social Security taxes on salaries	1,169.46
Federal income withholding tax	
withheld from salaries	3,583.93
Traveling expenses—Trustees and	
attorneys	3,485.19
Insurance premiums	25,355.24
Advertisements for sale—signs,	
newspapers, etc.	2,427.61
Office rent	1,097.50
Stationery and office supplies	579.56
Telephone and telegraph	559.64
Referees, attorneys, Trustees,	
etc.,—fees and expenses	115,435.96
Miscellaneous	15,234.73
	1,129,294.25
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Cash on hand April 9, 1947	\$ 551,386.27
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## RECEIPTS

### *Project Operations*

Beach Machine Works	\$ 8,846.37
Beach Properties	637.20
Casa Blanca Hotel	20,705.62
West Adams Gardens	1,712.33
Homestead Life Building	97.50
Petersen's Cafe	28,837.01
Stratford Hotel	23.31
Tip Top Hotel	13,782.72
Your Foods Fountain	22,684.66
Your Laundry	2,986.52
Ace Iron Works	8,062.54

Aladdin Products	764.42
American Laundry	47,734.34
Denman Garage	18,698.31
Denton James Sawmill	2,033.44
Golden Rule Bakery	4,141.82
Kean Hotel	15,546.43
Nellie O. Paget	1,692.13
Papenhausen Hardware	20,605.13
Petaluma Laundry	5,500.00
Paradise Meadows	5,953.69
Ladino Cheese Factory	29,431.56
New Hope Ranch	825.13
Grants Pass Hotel	5,177.25
Auction Sale, Oregon	60,225.60
Placer County Co-Operative Lbr. Co.	8,524.14
Rancho Dos Palmas	10,322.85
Silver Avenue Seminary	2,144.83
Your Building Materials	9,726.09
Your Parking Station	149.98
Ziegler's Creamery	575.86
Imperial Valley Hotel	2,659.29

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\$ 360,808.07

*Sale of Real and Personal Property*

Ziegler's Dairy	\$ 16,580.95
337-337½ South Hill St., L. A.	71,064.35
West Adams Gardens	152,200.19
Santa Monica Athletic Club	71,804.70
Lots 3, 4, 5, & 6, Block 4, Monterey	4,671.30
Lot 55, Tract 7737, Carlton Way	7,000.00
4000 Greenwood, Oakland	6,300.00
Denton James Sawmill, Willits, Cal.	49,379.78
3827 Clement St., Oakland	11,925.47
Pacific Grove, Monterey	1,425.00
Lot Erie, Pennsylvania	500.00
952-4 Ashbury St., San Francisco	15,500.00
3072 Bayshore Highway, Redwood Cy.	8,262.50
Flats and stores, Ocean Park	22,921.91
Kean Hotel & Mission Parking Lot, S. F.	85,027.75

Palomarin Rancho	2,250.00
Casa Blanca Hotel, Ontario	75,709.83
Tip Top Hotel, Azusa	48,075.33
Sorrento Beach Club, Santa Monica	169,440.46
4516 E. 56th St., Maywood	7,522.99
Fallon House, Petaluma	9,050.00
Your Laundry, Maywood	36,490.07

## RECEIPTS

### *Sale of Real & Pers. Property, Cont.*

Calif. Bank Bldg., Ocean Park	\$ 57,365.32
Denman Garage	2,000.00
Nellie O. Paget	288.96
Golden Rule Bakery, equip., S. F.	315.00
Rancho Dos Palmas, Gladiolus Bulbs	1,500.00
151 Safe Deposit Boxes	300.00

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\$ 934,871.86

### *Deposits on Real Estate Bids and Sales*

#### *Pending Litigation*

George H. Petersen	\$ 100.00
U. S. Treasury	8,780.65
Oregon Auction Sales,	
plumbing supplies	15,181.20
Pasha Pochigean	200.00
George Young	5,350.00
Edward Hale	460.00
D. Sugar	810.00
Stafford Hannon	1,310.00
Imperial Investment Co.	600.00
Bernard Bros.	3,000.00
E. W. Barryessa	3,450.00
L. Tobler	150.00
J. A. Franse	660.47
R. M. Pilson	200.00
L. K. Shortak	3,250.00
Jacob Van der Vlag	2,700.00
M. D. Hounshell	2,175.00
Alex Benjestore	6,350.00
Joseph B. Gould	12,200.00

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\$ 66,927.32



*Miscellaneous Rentals*

337 Hill St.	\$	372.68
3101 Main St.		150.00
974 Indiana Ave.		225.00
161 Marine St., Ocean Park		600.00
5600 Atlantic Blvd., Maywood		312.50
795—7th Ave.		9.00
Dairy Rancho Dos Palmas		800.00
64 South 10th, San Jose		12.00

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\$ 2,481.18

*Miscellaneous Receipts*

Wm. B. Mikulich—P. W. Sampsell, bal. 1st and final accounting	\$	6,430.77
Wm. B. Mikulich—P. W. Sampsell, Anc. Rec. revolving fund		916.71
J. W. Connors, refund advancement recording documents		1.50
Lee Leads, refund ins. premium		5.25
Chas. R. Hadles, refund State Rec. account		30.95
Sale of cattle		312.00
Union Bank & Trust Co., refund lighting assessment		71.33

## RECEIPTS

*Miscellaneous Receipts, Cont.*

Jackson Diggs, return premium earthquake insurance	\$	90.56
Loyalty Group, return premium Wavecrest		120.62
Aetna Insurance Co., ret. prem. insurance		27.53
St. Paul F. & M. Ins. Co. payment re accident to car Sacramento		156.86
Werner Tobler, sale of del. trk.		283.50
Denton James		60.35
Dept. Motor Vehicles, ret. fee		6.00
Pacific Gas & Elec. Co., refund of deposit		152.67
Wm. E. Bonton, ret. ins. premium		9.30

Sec. of State, Oregon ret. of fee auto license	5.00
T. I. G. Co., S. F., refund on taxes, Brawley property	97.91
Howard Gault, rebate of taxes Paradise Meadows	19.32
Marian T. Huff, refund penalty and interest taxes on Harold Way	152.92
Ruby V. Chapman, refund expenses Burlingame controversy	200.00
Pearl Assurance Co., motor vehicle	42.07
Stuventant Ins. Co., loss and damage Your Laundry	259.38
Travelers Ins. Co., return premium Victoria Ave. house & Hartford Ave.	37.73
Calif. Trust Co., balance 1945 escrow Your Laundry	92.15
W. Tobler, sale of manure	300.00
Pac. Tel. & Tel. Co., refund of deposit and interest	430.00
Estes Snedecor	50.03
Nellie O. Paget	35.00
Searle Bush, Homesteaders' part of telephone bill	44.46
Philip Cabibis, reimb. of part phone bill	30.38
St. Paul F. & M. Ins., payment of fire loss, Your Laundry	719.56
Mercury Ins. Co., S. F., fire damage Galbreath house	75.60
Pacific Gas & Elect., refund overpayt.	8.87
Dept. Water & Power, refund overpayment	6.28
St. Paul Ins., fire loss Tip Top Hotel	77.53
St. Paul Ins., fire loss Tip Top Hotel	31.94
So. Calif. Gas, overpayment of gas bill 5602 Atlantic	.80

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\$ 11,392.83

## DISBURSEMENTS

*Project Operations*

Beach Machine Works	\$ 2,990.71
Beach Properties	9,051.68
Casa Blanca Hotel	19,211.97
West Adams Gardens	1,438.11
Homestead Life Building	4,527.88
Petersen's Cafe	25,845.38
Stratford Hotel	5,403.67
Tip Top Hotel	8,831.37
Weavers of the Golden West	161.75
Your Foods Fountain	19,833.30
Your Laundry	2,294.86
Ace Iron Works	6,136.42
Aladdin Products	205.09
American Laundry	44,038.67
Denman Garage	13,984.81
Denton James Sawmill	5,284.27
Golden Rule Bakery	3,609.99
Kean Hotel	9,844.45
Nellie O. Paget	2,698.93
Papenhausen Hardware	22,644.10
Hillcrest Bulb Gardens	61,452.22
Paradise Meadows	12,932.13
Ladino Cheese Factory	32,251.57
New Hope Ranch	1,963.27
Galbreath Auto Court	1,238.52
Grants Pass Hotel	2,541.05
Oregon Projects	12,509.88
Auction Sale Oregon	4,227.68
Placer County Co-Operative	
Lbr. Co.	6,217.24
Rancho Dos Palmas	17,675.19
Silver Avenue Seminary	38,382.90
Your Buildings Material	13,935.41
Your Parking Station	131.16
Ziegler's Creamery	3,615.62
Imperial Valley Hotel	920.67

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\$ 418,031.92

*Deposits on Real Estate Bids and Sales  
Pending Litigation, returned by Trustees*

N. L. Nagler, reimb. exp. auction	
sales, plumbing supplies	\$ 1,962.54
George Young	5,350.00
Edward Hale	460.00
Stafford Hannon	8,780.65
Alex Benjestore	6,350.00
H. Von Norris	150.00
Transferred to General Account, deposits reported previous accounting	52,442.50

\$ 75,495.69

DISBURSEMENTS

*Sale of Real and Personal Property—Including LIENS  
337½ South Hill St.*

Title Ins. & Trust Co.—principal	\$ 24,975.88
“ “ “ “ “ interest	1,144.77
Pro rata taxes	1,647.98
Adjustment—rentals	100.01
Revenue stamp	78.10
Escrow fees	71.00
Title Insurance Co. charge	187.00
Recording fees, etc.	8.15
	<hr/>
	\$ 28,212.89
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*West Adams Gardens*

Aetna Life Insurance Co.—prin-	
“ “ “ “ “ cipal	\$ 42,752.55
“ “ “ “ “ inter-	
est	354.94
Adjustments—taxes	238.19
“ rents	639.66
Title Company charge	323.00
Escrow fees	126.00
Revenue stamp	103.95
Recording fees, notary, etc.	3.75
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	\$ 44,542.04
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*Santa Monica Athletic Club*

Title Ins. & Trust Co.—prin-	
cipal	\$ 27,278.36
"    "    "    "    "—inter-	
est	155.35
Commission	3,500.00
Adjustments—taxes	331.49
"            fire insurance	103.56
Title Company charge	185.00
Escrow fee	70.00
Revenue stamp	77.00
Recording fees, etc.	6.50
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	\$ 31,707.26
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*Lots 3, 4, 5, & 6, Block 4, Monterey, Calif.*

Monterey Savings & Loan—prin-	
cipal	\$ 3,296.35
"            "    "    "—inter-	
est	106.19
Title Company charge	48.00
Revenue stamp	5.50
Attorney fees	75.00
Recording fees, etc.	65.93
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	\$ 3,596.97
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*Lot 55, Tract 7737, Carlton Way*

Harold J. Block—principal	\$ 3,412.64
"    "    "    "—inter-	
est	172.67
Adjustment—taxes	44.45
Attorney fees	200.00
Foreclosure charges accrued	10.00
	<hr/>
	\$ 3,839.76
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*4000 Greenwood, Oakland*

Commission, H. L. Bryan Co.	\$ 300.00
Pro rata taxes	64.25
Taxes, 1944-45	48.63

Escrow fees	27.00
Revenue stamp	7.15
Title charges	10.50
Recordings, notary, etc.	8.50
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	\$ 466.03
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## DISBURSEMENTS

### *Sale of Real and Personal Property, Cont.*

#### *3072 Bayshore Highway, Redwood City*

Title charge	\$ 23.00
Adjustment—taxes	23.80
Revenue stamp	8.80
Escrow fee	15.75
Recordings, etc.	3.40
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	\$ 74.75
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#### *Flats and Stores, Ocean Park*

Title Insurance & Trust Co.—prin-	
cipal	\$ 7,108.66
“          “          “          “          inter-	
est	59.25
Adjustments—taxes	505.46
rents	1.25
Title charges	77.50
Escrow fees	23.00
Revenue stamp	25.30
Recordings, transfers, etc.	8.25
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	\$ 7,808.67
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#### *Kean Hotel & Parking Lot*

San Francisco Bank—principal	\$ 30,046.56
Herbst Bros.—principal	12,182.49
Revenue stamp	85.80
Title charges	49.50
Escrow fee	25.00
Recordings, etc.	9.50
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	\$ 42,398.85
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*Palomarin Rancho*

Revenue stamp	\$	2.75
Escrow fee		7.50
Recording		3.30
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	\$	13.55
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*Casa Blanca Hotel*

1st Natl. Bk., Ontario, pers. property	\$	453.85
1st Natl. Bk., Ontario—principal		4,394.47
“ “ “ “ interest		50.54
Commission		3,125.00
Title charges		272.50
Escrow fee		85.00
Revenue stamps		82.50
Tax adjustment		63.99
Proceedings guaranteed		44.50
Recordings, fees, etc.		12.25
		<hr/>
	\$	8,584.60
		<hr/> <hr/>

*Tip Top Hotel, Azusa, Calif.*

Adjusting inventory	\$	15.98
Pomona 1st Natl. Fed. Sav. & L. Assn. —prin- cipal		3,982.01
“ “ “ “ “ “ “ “ inter- est		48.95
Pomona Properties, Inc.—principal		1,372.26
“ “ “ —interest		22.40
Commission		2,375.00
Escrow fees		48.00
Title charges		140.00
Revenue stamp		52.25
Recordings, etc.		6.50
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	\$	8,063.35
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## DISBURSEMENTS

*Sale of Real and Personal Property, Cont.  
Sorrento Beach Club*

Security-First Natl. Bank—

	principal \$	44,523.27
" " " "	—	
	interest	79.07
Title charge		348.50
Escrow fee		134.50
Revenue stamps		136.95
Commissions		7,000.00
Adjustment of taxes		1,172.75
Recording		6.00
Paid to escrow 2418766		40.00

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\$ 53,441.04

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*4516 E. 56th St., Maywood*

Chester C. Kellogg—principal	\$	4,537.34
" " " —interest		49.90
Adjustment of taxes		11.03
Commission		375.00
Title charge		40.00
Escrow fee		13.50
Revenue stamp		8.25
Recordings, etc.		5.00

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\$ 5,040.02

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*Fallon House, Petaluma*

Est. of James P. Fallon, dec'd—

	prin-	
	cipal \$	2,100.00
" " " " " "	—	
	inter-	
	est	18.96
Pro rata taxes		36.75
Revenue stamps		10.45
Title charge		12.00



Escrow fees	18.00
Recordings, fees, etc.	6.90

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\$ 2,203.06

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*Your Laundry, 5600 Atlantic Blvd.*

Adjusting inventory	\$ 34.34
Balance sales price	108.43
Adjust taxes	85.61
Title charge	110.00
Escrow fee	36.00
Revenue stamp	39.60
Recordings, fees, etc.	2.00

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\$ 415.98

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*Calif. Bank Building, Ocean Park*

California Bank—principal	\$ 15,015.77
“ “ —interest	256.03
Pro rata tax	160.91
“ “ rent	49.95
Revenue stamp	63.25
Escrow fee	75.00
Title charge	161.00
Inventory adjustment	160.00
Recordings, etc.	6.50

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\$ 15,948.41

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## DISBURSEMENTS

*Sale of Real and Personal Property, Cont.**Denton-James Sawmill*

DeLancy Lewis &amp; Doris B. Lewis

—prin-

cipal \$ 3,748.10

“ “ “ “ “

—inter-

est 113.22

West Coast Redwood Corp

	—prin-	
	cipal	27,366.70
“	“	“
	—inter-	
	est	1,033.85

Stevenson Farm Equip. Co.

	—prin-	
	cipal	4,274.28
“	“	“
	—inter-	
	est	70.50

Stockton-Morris Plan Co.

	—prin-	
	cipal	2,373.57
“	“	“
	—inter-	
	est	69.22

M. J. Knier & J. L. Nolden,  
shortage dely. of property  
sold

926.32

Attorneys fees

150.00

Adjustment—taxes

142.38

Revenue stamp

57.20

Escrow fee

53.25

Title companies charges

67.00

Notary, recordings, etc.

15.00

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\$ 40,460.59

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3827 Clement St., Oakland

Walter & Emily Bevans

\$ 3,140.00

Adjustment—taxes

55.40

Revenue stamps

13.20

Escrow fees

20.00

Title company charges

13.00

Recording fees, etc.

15.40

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\$ 3,257.00

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*Pacific Grove—Monterey*

Pro rata taxes	\$	6.75
Revenue stamp		1.65
Escrow fees		15.00
Title company charges		43.00
Recording, notary, etc.		7.60
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	\$	74.00
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*Erie, Pa.*

Commission	\$	100.00
Preparation of deed		5.00
Revenue stamp		.55
Re-recording deed		3.20
		<hr/>
	\$	108.75
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*952-4 Ashbury St., San Francisco*

Evangeline Adam Spozio	\$	5,166.66
Marion Adams—principal		2,603.94
“ “ —interest		101.27
Commission		150.00
Adjustment—taxes		100.41
Title charge		15.00
Revenue stamps		17.05
Escrow fees		15.00
Recordings, fees, etc.		9.80
Rebate as per Order of 11-25-46		250.00
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	\$	8,429.13
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## DISBURSEMENTS

*Sale of Real and Personal Property, Cont.**Ziegler Dairy*

Placed in escrow with T.I.T. Co.		
Settlement	\$	6,680.95
First Natl. Bk., Monterey—		
“ “ “ “ — principal		6,374.71
“ “ “ “ — interest		242.94

Orion S. & Halcyon Ziegler	8,370.00
Mrs. Paul Clinefelter	500.00
Attorney fees	158.70
Adjusting taxes	636.54
Title charges	109.00
Revenue stamp	23.10
Escrow fee	25.00
Recordings, notary, etc.	27.50

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\$ 23,148.44

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*Nellie O. Paget, sale of interest*

Revenue stamp	\$ 1.10
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\$ 1.10

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\$ 331,836.24

*Real Estate and Personal Property Taxes*

H. L. Byram	\$ 3,881.14
Bureau of Assessments	30.62
Edward F. Bryant	8,435.18
A. A. Robinson	6.00
Fred R. Taylor	10.23
T. L. Munson	211.04
Gwen Johnson	317.58
W. A. McFadden	112.18
Tax Collector, City of Brawley	124.28
Security-1st Natl. Bank, L. A.	2,777.73
Roy P. Emerson	1,554.08
G. G. Batchelor	319.94
City Treasurer, Brawley	56.03
Howard Gault	2,320.62
City of Grants Pass	76.19
Lloyd Lewis	545.93
Grants Pass Irrigation Dist.	17.43

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\$ 20,796.20



## DISBURSEMENTS

*Payment on Real Estate Liens*

First Natl. Bank, Ontario—	
Casa Blanca Hotel	\$ 1,159.98
Adolph Schwartz—Your Ldry.	
Bldg.	2,756.06
Calif. Bank, L. A.—Wavecrest	
Club	3,528.00
Calif. Bank, L. A.—Calif.	
Bank Bldg., Ocean Park	1,500.00
Los Angeles Athletic Club—	
Santa Monica Athletic Club	400.00
Security-First Natl. Bank, L. A.—	
Sorrento Club, Santa Monica	10,260.00
The San Francisco Bank, S. F.—	
Kean Hotel	1,249.70
Title Ins. & Trust Co.—Flats	
and stores, Ocean Park	750.00
795-7th Ave., Menlo Park—	
Chester S. Kellogg	25.00
4516 E. 56th St., Maywood	700.00
Pomona First Fed. Loan Assn.,	
Pomona Tip Top Hotel	900.00
Surety Bldg. & Loan Assn., San Jose—	
Loan 4787	450.00
Loan 4791	405.00
Loan 4792	1,770.00
Loan 4793	2,148.00
Silver Av. Realty Co., St. Louis,	
Mo.—Silver Avenue Seminary	9,000.00
Independent Bldg. & Loan Assn., San	
Jose—456 N. 3rd St., San Jose	506.80
Charles A. Pugh—64 S. 10th St.,	
San Jose	1,067.08
Herbst Bros.—Kean Hotel Parking Lot	625.00
Bank of America, Santa Clara—	
Rancho Dos Palmas	5,518.75
Bert Griffey, Oregon—Griffey	
Contract	900.00

Adolph Woodrich, Grants Pass, Ore.—Ladino Cheese Products	560.00
M. F. Hanley, Medford, Ore.— Paradise Meadows	12,955.00
U. S. Natl. Bank, Grants Pass Ore.—Galbreath Properties	2,250.00
Jackson County Fed. Loan Assn., Oregon—Galbreath	246.40
H. G. Plummer—Hillcrest Bulb Garden Contract	2,544.00
First Fed. Savings & Loan, Hunt- ington Park—Petersen's Cafe	630.75
Bank of America, San Bernardino— Green Acre Ranch	360.00

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\$ 65,165.52

## DISBURSEMENTS

### *Payments on Personal Property Liens*

C. I. T. Corp.—Beach Machinery Equipment	\$ 528.52
American Trust, S. F.—Silver Avenue Seminary	888.15
John Forthun—Your Laundry	950.00
Mrs. W. A. Riker, San Bernar- dino—Your Foods Fountain	817.40

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\$ 3,184.07

### *Payments on Prior Claims*

O'Connell Bros.	\$ 106.84
C. L. Freeman	149.72
Golden State Meat Co.	635.39
Apartment & Hotel Laundry Service	357.42
Western Fish Company	168.90
Olson Bakery	90.43

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\$ 1,508.70

*Appraisal Fees*

B. J. Abbrott	\$ 99.80
A. J. Cranford	87.50
M. E. Kohler	50.00
John O'B. Bodkin	56.25
C. R. Cheek	56.25
C. M. Applestill	56.25
Carl R. Beebe	210.80
R. I. Oaks	37.50
Thos. M. Earl	43.75
John Jardine	38.00
Wallace E. Peters	12.50

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\$ 748.60

*Court Reporters' Fees*

Clifton Clay	\$ 2,840.75
Carolyn R. Blair	1,192.30
Albert Bargion	90.00
W. E. Newlon	50.00

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\$ 4,173.05

*Trustees' Agents and Employees  
Fees, Salaries and Expenses*

Frank A. Reddall	\$ 2,250.49
N. L. Nagler	11,557.46
Lillian E. Forbes	865.10
Street & Costello	3,987.94
Edwin R. Ridgway	3,554.24
M. Jeannette Ummel	101.10
Virginia N. List	55.10
A. J. Kuhler	2,878.02
V. E. Erickson	1,264.58
John O. England	1,693.33
Ralph E. Williams	113.50

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\$ 28,320.86

## DISBURSEMENTS

*Salaries—Caretakers, State Receivers,  
Detectives, etc.*

Al Bashin	\$ 25.00
A. J. Johnson	108.55
C. H. Manaugh	162.80
Norman Walton	81.60
J. C. Hoffman	115.60
Martin Riley	31.88
N. M. Hohstadt	48.78
Ross Beauchamp	20.00
Pinkerton Natl. Detectives	477.44
Thos. M. Earl	681.31
R. E. Post	236.97
Elias Sorras	92.74
R. E. Quinlan	120.58
H. N. Olson	24.00
Geo. John Navraides	63.42
Stanley J. Nietzel	33.32
H. J. Haasch	67.23
Frank Poole	735.16
Searle Bush	832.10
John Forthun	727.80
Grover Cottingham	39.23
Carlton S. Carver	139.85
Louis Foland	312.60
Martha O'Brien	104.20
Mabel W. Roy	364.70
Blanche Heinricy	652.57
Selma M. White	61.76
Estella T. Regotti	217.80
Dora Walker	653.40
Earl Taylor	1,226.18
Anna McAlpine	347.87
Wm. Guy	145.54
Marie Bole	403.16
O. K. Smith	300.00
H. E. Beecroft	786.80
Carroll W. Pursell	149.41
D. B. Penick	62.00
Villad Villadsen	127.33
Alma E. Horning	126.24



Milledge Walker	174.41
L. A. Board of Adjusters	15.00
Alice E. Wieder	8.25

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\$ 11,104.58

*Traveling Expense*

Grainger & Hunt	\$ 2,012.04
Paul W. Sampsell	1,333.44
John L. Martin	64.74
L. Boteler	74.97

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\$ 3,485.19

## DISBURSEMENTS

*Referees, Attorneys, Trustees, etc.**Fees and Expenses*

Walker, Grainger and Hunt, Attys.	\$ 37,500.00
Connors, Shapro and Rothschild, Attys.	6,532.98
Norman A. Bailey, Atty. for State Court Receiver	600.00
R. E. Allen, State Court Rec.	1,500.00
P. W. Sampsell and Wm. B. Mikulich, Anc. Rec.	5,000.00
P. W. Sampsell, Stewart McKee, J. Ray Files, Rec.	3,000.00
L. Boteler, P. W. Sampsell, Stew- art McKee, Trustees	20,000.00
Benno M. Brink, Referee	5,570.96
Burton J. Wyman, Referee	6,829.18
Arthur Young & Co., Auditors	28,902.84

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\$ 115,435.96

*Miscellaneous*

V. Roy Ellis Co., opening chest, drayage and storage	\$ 95.00
Laura Lindsay, notary fees	48.50
Title Ins. & Trust Co., lot book report 3 properties Ventura Co.	4.50
Grainger & Hunt, cost of record- ing deed	1.20

Realty Tax Service, sketches of So. Calif. property	14.71
Dept. of Water & Power, closing bill, Highland Bakery	8.38
J. T. Chinnock, water rights, Ore.	350.00
Peggy Rogers, multi. re obj. to claims	26.75
Title Ins. & Guar. Co., recon. and release chat. mtg. Kean Hotel	9.00
County Recorder, Sierra Co., 3 cert. and recopying	3.50
Paul W. Sampsell, reimburse book- keeper and postage	190.00
State Board of Equalization, master permit, 13 projects	12.00
State Bd. of Equalization, master permit	7.00
Rapid Blue Print, photostat. Fed. tax claims	52.43
So. Calif. Gas Co., closing bill, Hill St.	2.39
Title Ins. & Guar. Co., stamps on deed Wesley L. Hokenson	8.25
E. H. Conders, serv. U. S. Dist. Ct. subpoena on Henry Papenhausen	4.00
Peggy Rogers, mimeo. notice obj. to claims	54.75
Alameda Co.—East Bay Title Ins. Co., 13 maps	7.50
John O'B. Bodkin, mileage for app.	11.25
Irving G. Glaser, adjust inv. S. M. A. C.	53.68
Benno M. Brink, print notice of meeting of creditors	8.00

## DISBURSEMENTS

*Miscellaneous, Contd.*

E. E. Tool, bal. repair fire damage, Your Laundry	\$ 438.94
Action Printing Svc., labor, eqpt. to complete painting. Your Laundry	230.00

Title Ins. & Guar. Co., S. F., exp. for bookkeeping cards	94.52
H. E. Beecroft, painting, Novato Ranch	10.00
Speedy Attorney Svc., sub- poena, J. F. Moroney, Co. Clerk	3.00
E. H. Conders, process serv. fee— Brands	4.00
Benno M. Brink, exp. printing notice of sale	55.50
John Forthun, reimb. exp. & fire loss	150.16
Pioneer Title Ins. & Trust Co., report fees	15.00
State Bd. of Equal., int. due, extension period	1.82
Assoc. Tel. Co., closing bill, Sor.	6.52
P. W. Sampsell, reimb. misc. exp.	12.93
Clerk of U. S. Dist. Court, copy of Certification	6.00
Thos. M. Earl, showing stock, Denman Garage	6.24
So. Calif. Gas Co., bill Apt. 4, 5600 Atlantic	.80
P. W. Sampsell, reimb. exp. book- keeper, postage	197.00
R. G. Carroll, Harry G. Pines, comm.	7,500.00
Marian Huff, pro rata utilities, Beach prop.	105.60
Water Dept. Santa Monica, svc.	8.85
Rapid Blue Print, Photostats Placer Co. Lbr.	6.70
Louis Weiner, notary fees, etc.	7.48
John Forthun, reimb. gas, phone, repairs	47.24
L. Boteler, reimb. postage, adv.	40.00
E. H. Conders, process service	5.00
So. Calif. Gas Co., closing bill 5603 Atlantic	1.12
P. W. Sampsell, reimb. exp. and postage	185.00
P. W. Sampsell, adv. carfare, etc.	3.93

Natl. Plumbing & Heating Co., re- pair sewer	9.00
John Forthun, reimb. exp. Your Ldry.	102.00
Marian T. Huff, pro rata utilities, Beach prop.	105.60
Pioneer Title Ins. & Trust Co., reports	35.00
Salinas Title Guar. Co., reports for lit.	45.00
L. A. Stenographic Svc., mult. Your Building Materials	132.21
Water Dept. Santa Monica, closing bill	3.45

## DISBURSEMENTS

*Miscellaneous, Cont.*

P. W. Sampsell, reimb. exp. bookkeeper, postage	\$ 183.50
Paul P. O'Brien, est. exp. printing record vs Morrell	280.00
Saml. W. Bowe, cost exp. quiet title, Josephine Co., Ore.	50.00
Harry Skyrmann, cost of exp. quiet title, Jackson Co., Ore	200.00
Starring Plumbing, repairs Sorrento Club	33.59
A. A. Alert Letter Shop, typing stmts. for auditor	2.50
A. Todt, installation lock, Mary St. Whse.	11.11
Assoc. Tel. Co., svc. & tolls, Wavecrest	23.27
Bk. of America, wire charge on \$1200 check	.45
Bk. of America, wire charge on cks.	1.13
So. Calif. Gas Co., svc., Bank Bldg., Wavecrest	23.97
James M. Connors, exp. re mailing notices, notary fees, telegrams, etc.	198.64



Rapid Blue Print Co., blueprint re automobiles	33.48
Mary H. Norris, copy of amended schedules	31.50
Bk. of America, Santa Clara, cost of copying deed of trust	2.50
L. A. Stenographic Svc., mult. notices reception of bids, Novato	112.42
St. Paul Fire & Marine Ins. Co., cost of printing pictures 801 Silver Ave.	8.97
Nellie O. Paget, svcs. showing prop. 3072 Bayshore Highway	40.00
So. Calif. Tel. Co., svc. Home- stead 9/21-10/21	101.31
Mayfield Car Co., exp. auction sale autos	12.05
Pioneer Title Ins. Co., lot report, Casa Blanca	12.50
Title Ins. & Trust Co., report on lot, 8440 Carlton Way	1.00
L. A. Stenographic svc., mult. & mailing notices sale Brawley prop.	2.47
Hunter's Duplicating Svc., postage circulars Casa Blanca sale	20.00
Assoc. Tel. Co., exch. svc. S.M.A.C. Oct.	6.27
Dept. Water & Power, elec. 974 Ind.	6.28
So. Calif. Gas Co., 10/8-11/8, 5602 Atlantic	.80
Natl. Plumbing & Heating repair water heater, Wavecrest	20.58
P. W. Sampsell, refund exp. bookkeeper, postage	197.00
E. E. Tool, part payment rep. fire damage Your Laundry	200.00
Rapid Blue Print—inv. sheets	8.76

## DISBURSEMENTS

*Miscellaneous, Cont.*

P. W. Sampsell, reimb. exp. bookkeeper, postage	\$ 182.00
Title Ins. & Guar. Co., title pol. and recording deeds, Folsom St. Whse.	62.20
Abbey Locksmith Co., matls. & chg. locks, 70 Mary St.	27.12
E. H. Conders, serv. of subpoenas on Papenhausen	4.00
A. A. Alert Letter, typing find. of facts and order	2.50
Dick's Van & Storage, cartage records, Oakland to S. F.	54.08
Benno M. Brink, exp. printing notices meeting of creditors	13.32
So. Calif. Tel. Co., tolls and extra units	43.51
P. W. Sampsell, reimb. exp., bookkeeper and postage	185.00
Title Ins. & Guar. Co., report on prop. held in trust—Lot 43, Belvedere Gardens	50.00
L. B. Bd. of Adjusters, re adj. making copies	14.05
A. A. Alert Letter—typing order discontinuance of business	1.23
L. A. Stenographic Svc., multi. re Paradise Ranch and order discont. business	143.17
S. F. Chronicle, adv. Spozio home	17.28
Benno M. Brink, cost printing notice to creditors re sale	49.66
Rapid Blue Print, blue print Hillside Circle	4.64
So. Calif. Tel. Co., service	69.49
So. Calif. Gas Co., balance bill, Hill St.	9.21

So. Calif. Edison Co., elec. bill, Wavecrest	15.10
So. Counties Gas Co., Wavecrest & Sorrento	21.93
L. A. Stenographic Svc., notice re- ceipt of bids, Redwood City prop.	58.55
L. A. Stenographic Svc., rec. bids Kean Hotel & Parking Lot	141.33
P. W. Sampsell, mimeo. letter re Seminary	7.76
Rapid Blue Print, map of Palomarin Ranch	6.70
Jack Byrne, exp. trip Reno to L. A. re interview with Trustees as per their request	81.95
Griffith & Griffith Safe Co., Storing deposit boxes	99.00
So. Calif. Gas Co., svc., 5602 Atltc.	70.91
Santa Monica Water Dept., service	13.95
So. Calif. Gas Co., svc. 924 Indiana	2.87
Assoc. Tel. Co. svc. 924 Indiana	6.10
So. Calif. Edison Co., closing bill S. M. A. C.	40.94

## DISBURSEMENTS

*Miscellaneous, Cont.*

P. W. Sampsell, reimb. exp. bookkeeper, postage	\$ 189.00
Grover Cottingham, hauling furniture	30.00
Pierce Trucking Co., moving safe	17.77
National Plumbing & Heating, repairs Wavecrest	9.05
John Forthun, reimb. utilities, Your Laundry	36.75
L. A. Stenographic Service, notices Imperial Valley	111.91
Harold L. Hagen, travel exp. 1/6-9	35.00

Parker & Co., appel. opening brief	56.37
C. R. Gregory, rede. Tip Top, fire loss	69.00
Nellie O. Paget, col. fees, 795-7th Ave.	1.00
Bekins Van & Storage Co., moving furniture to office	49.70
Smith Bros. Auto Trim, repair Chev. Pickup	100.00
H. Papenhausen, install plate glass, Golden Rule Bakery	60.11
R. A. Rowan, lettering door, Trustees' office	15.40
S. V. Sampiai, doctor bills before term. maint.	210.50
So. Calif. Edison Co., service, Your Laundry	41.13
Calif. Typewriter Exch., repairs	17.50
Franchise Tax Comm., tentative tax	21.25
Frank A. Reddall, reimb. stamps	13.00
Title Ins. & Trust Co., record. lot Your Laundry	4.80
Bruce Hudson Transfer, hauling rec.	5.79
Joe Du Prez, exp. Imperial Valley Sale	15.00
Frederick W. Lyttle, exp. Imp. Val.	10.00
Maywood Mutual Water Co., service Your Laundry	1.00
John L. Martin, exp. Imp. Valley Sales	30.06
Maywood Mutual Water Co., service Your Laundry	1.00
John Forthun, reimb. tel., Your Laundry	7.02
So. Calif. Gas Co., closing bill, Your Laundry	2.88
So. Calif. Gas Co., industrial service Your Laundry	30.00
Bank charge, S. F. revolving fund	.50



Water Dept., Santa Monica, closing bill 3/1	3.75
D. B. Penick, svcs. pet. & OSC 3/6-7	24.00
Water Dept. Santa Monica, closing bill Calif. Bank Building	1.40
So. Calif. Edison Co., closing bill Your Laundry	5.65
Pioneer Title Ins. & Trust, pre- liminary report	30.00
Rapid Blue Print, sum. assets & liabilities, C. C. G. R.	13.91
P. W. Sampsell, reimb. expense, bookkeeper, postage	88.53
W. G. Anderson, overcharge auction sale bakery equipment	2.00
	<hr/>
	\$ 15,234.73

CHRIST'S CHURCH OF THE GOLDEN RULE  
COMMENTS

In the amount of cash on hand (\$551,386.27) the following amounts were included; however, title to property is in dispute:

Ace Iron Works	\$ 750.00
Papenhausen Hardware Co.	4,000.00
Placer County Co-Operative Lumber Co.	1,500.00
Your Building Materials Co.	2,500.00
Petersen's Cafe	5,848.17
Your Foods Fountain	3,488.43
	<hr/>
	\$18,086.60
	<hr/>

No receipts were considered for period from Hillcrest Bulb Gardens, Oregon.

All Oregon projects were behind in receipts and disbursements; no accruals were made.

American Laundry receipts, as per the report, were to March 17. Amounts to be accrued would be: receipts, \$4,211.53; disbursements, \$1,750.56.

Petaluma Laundry figure is amount deposited during period. No accruals were made.

Activity between Trustees—Ace Iron Works, Papenhausen Hardware, terminated at time of termination of maintenance to members; Your Buildings Materials in November and Placer County in January—amount of business activity unknown.

No accruals were made concerning the activity of the Imperial Valley Ranches.

Endorsed: Filed Jun. 19, 1947, 3:25 p. m. Benno M. Brink, referee; Florence Robinson, clerk m.

Filed Sep. 10, 1947, 5 p. m. Edmund L. Smith, clerk; by F. Betz, deputy clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

Peter Petersen, Mrs. Peter A. Petersen, George Patrick, appellants, vs. Paul W. Sampsell, L. Boteler and McIntyre Faries, as Trustees in Bankruptcy of the Estate of Christ's Church of the Golden Rule, Bankrupt, respondents. No. 11874.

COUNTER-DESIGNATION OF TRUSTEES IN BANKRUPTCY  
OF CONTENTS OF RECORD FOR PRINTING.

*To Paul P. O'Brien, as Clerk of the Above Entitled Court:*

Come now Paul W. Sampsell, L. Boteler and McIntyre Faries, as the trustees in bankruptcy of Christ's Church of the Golden Rule, a corporation, bankrupt, and present herewith a counter-designation of the record, proceedings and evidence to be contained in the record on appeal herein, involving George Patrick and Mr. and Mrs. Peter Petersen, from the Court below denying their motion to set aside the adjudication in bankruptcy herein.

The aforesaid trustees are of the belief that the designation of the contents of the record for printing as heretofore requested by the said appellants does not completely disclose what occurred in the hearings in the District Court of the United States. The trustees do now, therefore, present a complete counter-designation which the trustees believe is necessary to disclose all matters considered by the Courts below, to-wit:

1. Petition for order authorizing the filing of petition for arrangement under the provisions of Chapter XI without the filing of a schedule of assets and liabilities and statement of affairs, filed Nov. 1, 1945.

2. Order authorizing the filing of petition for arrangement under the provisions of Chapter XI of the Bankruptcy Act, as amended, without the filing of a schedule of assets and liabilities and a statement of affairs, filed Nov. 1, 1945.

3. Petition under Chapter XI (Sec. 322) of the Bankruptcy Act, together with Exhibits "A," "B" and "C" attached, filed Nov. 1, 1945.

4. Request for and consent to adjudication by bankrupt, filed Nov. 15, 1945.

5. Voluntary petition in bankruptcy, together with schedules annexed and certified copy of resolution of Board of Directors of bankrupt consenting to adjudication, filed Nov. 15, 1945.

6. Order of adjudication and of general reference, filed Nov. 19, 1945.

7. Order on petition for dismissal and order of adjudication, filed Nov. 19, 1945.

8. Order appointing receivers, filed Nov. 19, 1945.

9. Order approving receivers' bond, filed Nov. 21, 1945.

10. Petition of bankrupt for ancillary proceedings in the United States District Court of Oregon, filed Nov. 23, 1945.

11. Order authorizing ancillary proceedings in District of Oregon, filed Nov. 23, 1945.

12. Petition of bankrupt for ancillary proceedings in the United States District Court for the Southern Division of the Northern District of California, filed Nov. 24, 1945.

13. Order authorizing ancillary proceedings in the Northern District of California, filed Nov. 24, 1945.



14. Statement of affairs of bankrupt, filed Dec. 5, 1945.

15. Amended and supplemental schedules of bankrupt, filed Dec. 17, 1945.

16. Order approving Trustees' bond filed with Referee in Bankruptcy Brink of this court on Jan. 5, 1946.

17. Amended and supplemental schedules of bankrupt, filed March 6, 1946.

18. Special appearance to object to summary jurisdiction filed by Peter Petersen with said Referee on May 31, 1946, and answer of Mr. and Mrs. Petersen filed with said Referee on July 22, 1946, both of which are now on file with the Clerk of the above entitled court as of Oct. 3, 1947, in connection with the certificate of said Referee on review of his order against Mr. and Mrs. Petersen, dated June 10, 1947, determining title to real and personal property in favor of said trustees.

19. Reporter's transcript of testimony of Peter Petersen before said Referee on July 25, 1946, page 57, lines 2-24, and of Mrs. Peter (Clara) Petersen on the same date, page 92, lines 1-11. The said transcript is now on file with said Clerk as of Oct. 3, 1947, in connection with the certificate of said Referee on review of his order of June 10, 1947, against Mr. and Mrs. Petersen, determining title to real and personal property in favor of the said Trustees.

20. Order of said Referee dated July 25, 1946, determining title to personal property and of sale, against George D. Patrick and in favor of the Trustees herein, and now on file with said Clerk as of Sept. 27, 1946, in connection with said Referee's certificate on review of said order (first review).

21. Supplemental and amended answer of George D. Patrick filed with said Referee on Dec. 12, 1946, and now on file with said Clerk as of Sept. 29, 1947, in connection with said Referee's certificate on review of his order dated Feb. 11, 1947, determining title to personal property against George D. Patrick and in favor of said trustees (second review).

22. Second amended and supplemental answer of George D. Patrick filed with said Referee on Jan. 2, 1947, and now on file with said Clerk as of Sept. 29, 1947, in connection with said Referee's certificate on review of his order of Feb. 11, 1947, determining title to personal property against George D. Patrick and in favor of said trustees (second review).

23. Third amended and supplemental answer filed by George D. Patrick on Jan. 14, 1947, with said Referee, and now on file with said Clerk in connection with the said Referee's certificate on review of his order of Feb. 11, 1947, determining title to personal property against George D. Patrick and in favor of the said Trustees. (Second review.)

24. Articles of incorporation and by-laws of the bankrupt corporation set forth as exhibits in petitioner's exhibit No. 1 (first amended complaint in Action No. 506332 in the Superior Court of Los Angeles County, California, wherein the People of the State of California are the plaintiffs and the bankrupt corporation and others are the defendants) in evidence before the above entitled court on Nov. 13, 1945, in connection with the hearing on the order to show cause issued by said Court on Nov. 7, 1945, at the request of the People of the State of California and directed against the bankrupt (debtor) corporation.

25. Report and account of Receivers filed with said Referee on Nov. 8, 1946, and on file with the said Clerk as of Sept. 10, 1947, in connection with the certificate on review of said Referee from his order of Aug. 8, 1947, fixing the compensation of said receivers.

26. Order approving report and account of receivers, filed with said Referee on Dec. 31, 1946, and now on file with said Clerk as of Sept. 10, 1947, in connection with the certificate on review of said Referee from his order of Aug. 8, 1947, fixing the compensation of said receivers.

27. First report of trustees and petition for first dividend filed with said Referee on Nov. 8, 1946, and now on file with said Clerk as of Sept. 10, 1947, in connection with said Referee's certificate on review of his order of Aug. 8, 1947, fixing compensation of receivers.

28. Memorandum of said Referee dated Dec. 20, 1946, approving first report of trustees, and now on file with said Clerk as of Sept. 10, 1947, in connection with said certificate on review.

29. Second account and report of trustees—application of trustees for compensation, filed with said Referee on June 19, 1947, and now on file with said Clerk as of Sept. 10, 1947, in connection with said Referee's certificate on review of his order of Aug. 8, 1947, fixing compensation of receivers.

30. Memorandum of said Referee filed July 29, 1947, approving second account of trustees, and now on file with said Clerk as of Sept. 10, 1947, in connection with said certificate on review.

31. Notice of motion of George Patrick and Mr. and Mrs. Petersen to set aside adjudication in bankruptcy, filed Oct. 27, 1947.

32. Answer of Trustees in Bankruptcy to motion to set aside adjudication, filed Nov. 12, 1947.

33. Reporter's Transcript of proceedings before the above entitled Court on Nov. 14, 1947, in connection with said motion to set aside adjudication and hearing on Patrick and Petersen reviews.

34. Order denying motion to set aside adjudication, filed and entered Dec. 29, 1947.

35. Notice of appeal filed Dec. 29, 1947.

36. Statement of points on appeal filed Dec. 29, 1947.

37. Designation of contents of record for printing to the Clerk of this Court filed by the appellants herein—Peter Petersen, Mrs. Peter A. Petersen and George Patrick.

38. This counter-designation.

Dated: May 17, 1948.

MARTIN GENDEL,  
FRANK C. WELLER and  
THOMAS S. TOBIN,  
By MARTIN GENDEL,  
MARTIN GENDEL,  
*Of Counsel for Trustees.*

Service of copy acknowledged by Crittenden in clerk's office on May 17, 1948.



At a Stated Term, to wit: The October Term 1947, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the fourteenth day of June in the year of our Lord one thousand nine hundred and forty-eight.

Present:

Honorable Francis A. Garrecht, Senior Circuit Judge,  
Presiding;

Honorable William Denman, Circuit Judge;

Honorable William Healy, Circuit Judge.

Peter Petersen, *et al.*, appellants, vs. Paul Sampsell, *et al.*, appellees. No. 11874.

ORDER ON MOTION TO EXCLUDE IRRELEVANT AND EX-  
TRANEIOUS MATTERS FROM PRINTED TRANSCRIPT.

Ordered motion of appellants for an order excluding irrelevant and extraneous matters from printed transcript of record presented by Mr. Howard B. Crittenden, Jr., counsel for appellants, and by Mr. Martin Gendel, counsel for appellees, and submitted to the court for consideration and decision.

Upon consideration thereof, it is further ordered that counsel for appellants shall not be required to print the transcript of record in this cause; that counsel for respective parties shall print, as an appendix to their respective

briefs, those portions of the transcript of record on which they rely.

I hereby certify that the foregoing is a full, true, and correct copy of an original Order made and entered in the within-entitled cause.

Attest my hand and the seal of the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 15th day of Sept., 1948.

(Seal)

PAUL P. O'BRIEN,

*Clerk, U. S. Court of Appeals for the Ninth Circuit.*

No. 11,874.

In the United States Circuit Court of Appeals for the Ninth Circuit.

In the matter of Christ's Church of The Golden Rule, a corporation, Bankrupt.

Peter Petersen, Mrs. Peter Petersen and George D. Patrick, appellants, vs. Paul W. Sampsell, L. Boteler and McIntyre Faries, as Trustees in Bankruptcy of the Estate of Christ's Church of The Golden Rule, bankrupt, appellees.

STIPULATION AND REQUEST THAT TIME FOR FILING OF  
'APPELLEES' REPLY BRIEF BE EXTENDED.

Whereas, the appellants' opening brief was not received by counsel for appellees until July 23, 1948, and

Whereas, Martin Gendel, of counsel for the appellees, who is the only one of the associated counsel familiar with the issues and pleadings involved on behalf of the appellees, and the counsel responsible for the preparation and filing of the reply brief and the presentation of the oral argument thereon, is now engaged in matters before the United States District Court in Bankruptcy, and will be so engaged for each court day to and including the 30th day of July, 1948, and

Whereas, the said Martin Gendel will be out of his office completely during the month of August, 1948, on a vacation arranged many months ago, and

Whereas, the particular issues presented in the within appeal and the voluminous, designated record present a very difficult and time-consuming problem, particularly since this Honorable Court, by order on July 19, 1948,

has permitted the parties to this action to select the portions of the designated record to be printed, with the further provision that the remaining portions of the type-written record will be considered by this Court in their original form.

Now, therefore, it is stipulated that the appellees may file their reply brief on or before the 28th day of September, 1948.

Dated: July 23, 1948.

HOWARD B. CRITTENDEN, JR.,  
HOWARD B. CRITTENDEN, JR.,  
*Attorney for Appellants.*

MARTIN GENDEL,  
MARTIN GENDEL,  
*Of Counsel for Appellees.*

So ordered:

FRANCIS A. GARRECHT,  
*United States Circuit Judge.*

Endorsed: Filed Jul. 29, 1948. Paul P. O'Brien, clerk.





No. 11,874

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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In the Matter of

CHRIST'S CHURCH OF THE GOLDEN RULE,  
a California Non-Profit Religious Corpora-  
tion,

Bankrupt.

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PETER PETERSEN, MRS. PETER PETERSEN and  
GEORGE D. PATRICK,

*Appellants,*

vs.

PAUL W. SAMPSELL, L. BOTELER and McIN-  
TYRE FARIES, as Trustees in Bankruptcy  
of the Estate of Christ's Church of The  
Golden Rule, Bankrupt, and CHRIST'S  
CHURCH OF THE GOLDEN RULE, Bankrupt,  
*Appellees.*

**APPELLANTS' REPLY BRIEF.**

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HOWARD B. CRITTENDEN, JR.,

Central Tower, San Francisco 3, California,

*Attorney for Appellants.*

OCT 4 - 1948

PAUL P. O'BRIEN,



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No. 11,874

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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In the Matter of

CHRIST'S CHURCH OF THE GOLDEN RULE,  
a California Non-Profit Religious Corpora-  
tion,

Bankrupt.

---

PETER PETERSEN, MRS. PETER PETERSEN and  
GEORGE D. PATRICK,

*Appellants,*

vs.

PAUL W. SAMPSELL, L. BOTELE and MCIN-  
TYRE FARIES, as Trustees in Bankruptcy  
of the Estate of Christ's Church of The  
Golden Rule, Bankrupt, and CHRIST'S  
CHURCH OF THE GOLDEN RULE, Bankrupt,  
*Appellees.*

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**APPELLANTS' REPLY BRIEF.**

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**THE PETERSENS AND PATRICK AS PERSONS IN THE RELI-  
GIOUS SOCIETY ARE PROPER PARTIES IN THE INSTANT  
PROCEEDING.**

The Appellees urge in their brief that the Appellants  
are not proper parties to bring the instant proceedings.



In the District Court, the Appellees attempted to insert such a finding, but the Court refused and struck the proposed finding (Appellants' Suppl. pp. 123-4).

In the summary proceedings against the Appellants, the Appellees urged that the Petersens and Patrick had forfeited their respective property for religious beliefs and affiliations with the religious society at bar, whose temporal agency had fallen into the clutches of bankruptcy. The records of both those summary proceedings were made grounds of and a basis for the instant motion (Appellants' Suppl. p. 29). We need not go through the extensive evidence in those transcripts and a part of the instant appeal record. We need only point to contentions of Appellees' counsel shown in the printed portions of the record.

(a) Mr. Martin, attorney for Appellees, stated Petersens were "loyal members" of the church and had not withdrawn from the corporate or ecclesiastical body, and their case must be treated differently from those who had withdrawn (Appellants' Suppl. pp. 57-8).

(b) Mr. Martin urged that Mr. Petersen had not rescinded his relationship with the church; he said he sits an active participant in the church group (Appellants' Suppl. p. 58).

(c) Mr. Hunt, attorney for Appellees, stated that in Patrick's matter he would not stipulate to anything, as he was a "loyal" member (Appellants' Suppl. p. 59).

(d) Mr. Hunt charged Patrick had not repudiated any of the religious beliefs and that he has not shown

that he has completely severed himself from the church or that he expects to do so in the future (Appellants' Suppl. pp. 114-5).

(c) Mr. Hunt stated the Patrick record showed that he went to work on a church project and was active in the church (Appellants' Suppl. p. 116).

It is the established law, that those in a religious society may bring an action for the society, even if there be a board of trustees of the society.

*Wheelock v. First Presbyterian Church*, 119 Cal. 477, 51 P. 841.

Aside from this, the Appellants were subjected to a course of treatment and conduct without precedent. The Appellees brought them into the Bankruptcy Court upon summary proceedings, claiming their property forfeited, upon various grounds, including their religious beliefs and affiliations; subjected them to an inquisition as to their religious beliefs and church affiliations; the Appellees moved to have the respective defenses of the Appellants struck for reason of their religious beliefs, and the Referee struck them for that reason. Jurisdiction in summary proceedings against the Petersens for their home and their business was predicated upon their religious affiliations and the affiliations of those working with them. The lack of jurisdiction to adjudicate the religious society's temporal agency and the religious persecutions were raised before the Referee in 1946 in these summary proceedings. Both the summary proceedings against Appellants were taken on review to the District Court, and both came on for hearing

in the District Court at the same time. To clearly present these points, the motion was noticed and heard with the reviews. It was their shield to protect themselves from the unprecedented religious persecutions and attack upon Appellants by Appellees. It was the Appellants' shield to protect their constitutional rights stated in the Bill of Rights, and to protect their church. Although the Court could consider matters of jurisdiction and matters of abuse of its temple and process *sua sponte*, of its own motion, when it appeared in the evidence in these reviews (see Appellants' Opening Brief, pp. 24-5, 31-2), it was considered better to present the entire matter fully and clearly by a motion. Our jurisprudence relies upon counsel to present matters to it and does not contemplate the judge making independent investigations of pending cases. This is what counsel did, and the matter was presented by motion, and evidence in support offered and some received. Much appeared in the records on review in the two cases of the Appellants. The Appellants are entitled to be heard in defense of their constitutional rights set forth in the Bill of Rights—freedom of religion. The Appellants have a standing in this Court to defend themselves and their church from abuse of the federal judiciary through the Bankruptcy Courts in such a religious persecution as shown in the record of the case at bar, and certainly when the judicial proceedings are without jurisdiction. We submit they are proper parties in this proceeding, and entitled to the protection of this Court.



**THERE WAS NO JURISDICTION TO ADJUDICATE THE  
TEMPORAL AGENCY A BANKRUPT.**

1. There is no more firmly established rule of law than that a Court without jurisdiction cannot have jurisdiction conferred upon it by laches, estoppel or consent.

2. It is an axiom of our law that the question of jurisdiction to hear and decide can be raised at any time during the proceedings.

3. As in *Valley v. Northern F. & M. Ins. Co.*, 254 U.S. 348, 41 S.Ct. 116, 65 L.Ed. 297, the facts appeared in the petition. In the case at bar it is affirmatively alleged the Petitioner under Chapter XI was a California non-profit religious corporation, conducting the affairs for the benefit of a religious society (Pars. I and IV, Appellants' Suppl. pp. 2-4). It is affirmatively alleged in the voluntary petition (Appellants' Suppl. p. 15). It is the established law of California that a religious society with a non-profit California religious corporation as a temporal agency, holds its property in the name of the temporal agency under a trust for the ecclesiastical society and the individuals in it, with power to control and manage in the interests of the spiritual ends of the church, and the temporal agency is a subordinate factor. See Appellants' Opening Brief, pages 14 to 19.

4. Appellees stated in their brief, page 7, that Judge Mathes dismissed the plan of arrangement and then adjudicated the church a bankrupt. The order of the District Court dismissed the chapter proceedings by denying the petition which attempted to ini-



tiate it,<sup>1</sup> and attempted to adjudicate the church temporal agency a bankrupt (Appellants' Suppl. p. 20).

(a) After dismissal of a proceedings in bankruptcy, the Court has no jurisdiction to hear or determine any controversy between the petitioning creditor and the firm alleged to be a bankrupt.

*In re Sig. H. Rosenblatt & Co.* (2nd Cir.), 193 F. 638.

(b) The statute, 11 U.S.C.A. 776, provides where an arrangement fails, there is either an adjudication after notice and a hearing *or* a dismissal of the proceedings, which ever may be in the interest of creditors.<sup>1a</sup>

It appears from the District Court's order for dismissal and order for adjudication (Appellants' Suppl. p. 20) that there was a contest and notice as to the

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<sup>1</sup>The order states: " \* \* \* that the Debtor's petition for an arrangement under Section 322, Chapter XI, of the Bankruptcy Act as amended, be and said petition is hereby denied without prejudice to the right of the Debtor hereafter to file a further petition for an arrangement under Section 321, Chapter XI of the Bankruptcy Act, as amended, if so advised; "

<sup>1a</sup>11 U.S.C.A. 776 reads: "If an arrangement is withdrawn or abandoned prior to its acceptance, or is not accepted at the meeting of creditors or within such further time as the court may fix, or if the money or other consideration required to be deposited or the application for confirmation is not filed within the time fixed by the court, or if confirmation of the arrangement is refused the court shall \* \* \* "

(1) (Where petition was filed in a bankruptcy proceedings under Sec. 721.)

"(2) Where the Petition was filed under Section 722 of this title, enter an order, upon hearing after notice to the debtor, the creditors and such other persons as the court may direct, either adjudicating the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this title or dismissing the proceedings under this chapter, whichever in the opinion of the court may be in the interest of the creditors."

legality of a Chapter proceedings, but no notice to creditors or those in the religious society or other interested persons as required under 11 *U.S.C.A.* 776, nor was the action taken by the Court in the interest of creditors. The Court acted in the conjunctive “and” both dismissing the proceedings and adjudicating the church temporal agency, not in the alternative “or” of the statute either dismissing or adjudicating a bankrupt. Having dismissed the proceedings no Court would have jurisdiction to immediately make a judgment of adjudication of status of bankruptcy against a party to the proceedings already dismissed.

It appears from the record that the District Judge entertained a doubt as to Chapter proceedings which might terminate in an involuntary adjudication in bankruptcy of a church corporation which could not be adjudicated an involuntary bankrupt. See Appellants’ Supplement, pages 86-7. The trial judge stated that in the original objection to the Chapter proceedings he was inclined to the view that involuntary adjudication would be impossible (which had inclined the Court against permitting the Chapter proceedings). It should be noted that the Court’s view is the law, for a corporation, not a commercial, business or moneyed corporation cannot be under a Chapter proceedings for it cannot be involuntarily made a bankrupt. *Hoile v. United Life Ins. Co.* (4th Cir.), 136 F. 2d 133; *Mich. Sanitarium Benevolent Ass’n* (D.C. Mich.), 20 Fed. Supp. 979, appeal dismissed 96 F. 2d 1019 (both are Chapter X proceedings where “corporation” is defined as any corporation that can be ad-

judged a bankrupt, and “debtor” under Chapter XI is any person who can be adjudged a bankrupt). It follows that if the church temporal agency was not a person who could bring a Chapter XI proceedings, there was no proceedings under Chapter XI, Section 776, in which it could be adjudicated a bankrupt.

Of course, a religious society’s corporate temporal agency from the nature and according to the California law under which it holds property for the ecclesiastical body and those in it under a trust, and by reason of our constitutional Bill of Rights and our heritage of freedom of religion, cannot be made the subject of an adjudication in bankruptcy. This is covered in the Opening Brief.

Appellees urge in their brief that because the religious society earned money, not begged it, whose ultimate use and destination were religious uses, it was a moneyed, business or commercial corporation under the bankruptcy law. The temporal agency was incorporated under the non-profit corporation laws of California (Appellants’ Suppl. p. 2). Provisions of the state law under which the corporation was incorporated that it is non-profit has a predominate influence upon the Court in bankruptcy proceedings when such a claim is raised.

*Hoile v. United Life Ins. Co.* (4th Cir.), 136 F. 2d 133, 148 A.L.R. 710.

That a corporation, entity or trust may engage in a commercial enterprise for profit does not effect the character of the activities, if the ultimate destination of all net earnings is for religious, charitable or other



eleemosynary purposes exclusively. There are a line of taxes cases on this point.

*Roche's Beach v. C.I.R.*, 96 F. 2d 776;

*Sokol v. Higgins* (2nd Cir.), 147 F. 2d 774;

*Jones v. Better Business Bureau of Okla. City*  
(10th Cir.), 123 F. 2d 767;

*Hanover Improvement Soc. Inc. v. Gage* (1st  
Cir.), 92 F. 2d 888;

*Union & New Haven Trust Co. v. Eaton* (D.C.  
Conn.), 20 F. 2d 419;

*C.I.R. v. Battle Creek* (5th Cir.), 126 F. 2d 405;

*Slocum v. Bowers* (D.C. N.Y.), 15 F. 2d 400,  
aff. 20 F. 2d 350;

*Debs Memorial Radio Fund v. C.I.R.* (2nd Cir.),  
148 F. 2d 948;

*Trinidad v. Sagrada Orden de Predicadores*, 263  
U.S. 578, 69 L.Ed. 458, 44 S.Ct. 204.

The statutes under which a corporation is incorporated, and the provisions of the charter that it is organized for non-profit tax exempt purposes are conclusive.

*Harrison v. Barker Annuity Fund* (7th Cir.),  
90 F. 2d 286 (tax case).

In determining the character of a corporation as to whether it is one that may be adjudicated a bankrupt, the test is the power conferred by the charter and the statutes under which it is incorporated and not the activities of the corporation.

*In re Union Guar. & Mtg. Co.* (2nd Cir.), 75 F.  
2d 984;

*Security B. & L. Assoc. v. Spurlock* (9th Cir.),  
65 F. 2d 768;



*In re Prudence Co.* (2nd Cir.), 79 F. 2d 77,  
cert. denied 296 U.S. 646;  
*Clemons v. Liberty Sav. & Real Estate Co.* (5th  
Cir.), 61 F. 2d 448.

There is no question that the church used all its income however derived exclusively for the religious purposes, and its temporal agency was incorporated under the California non-profit corporation laws intended for temporal agencies of religious societies and the like.

One of the religious doctrines of the religious society at bar is that Christianity can be lived and applied in every day life not merely talked about; and its ministry includes the spreading of its teachings of Christianity by precept and example, as well as by the written and spoken word. Its illustrations of its teachings includes every day activities; and that its ministry may support the activities of spreading its teachings by their religious illustrations makes it not a venture for profit, for by its very terms, all net income must be and was used exclusively for the religious purposes of the church.

Furthermore, it is the policy of the law that money and property dedicated to religious, charitable and eleemosynary purposes, be of necessity used for that purpose. For this reason they may not be forced into bankruptcy.

*In re Michigan Sanitarium Benevolent Assoc.*  
(D.C. Mich.), 20 F. Supp. 979.

Few would contribute to eleemosynary funds and corporations if they could be diverted from their use

and trust, however solvent, by a voluntary or involuntary bankruptcy, merely because of a difference between an official of the fund or corporation and some state official and there were about \$3,500,000 of assets over some \$111,000 of current debts. Even stronger is the case where the funds are owned by the spiritual body and those in it, and are held by a temporal agency in trust to manage and control in the interests of the spiritual body.

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**LACHES HAS NO APPLICATION IN THIS MATTER, CONFERS NO JURISDICTION, AND PRECLUDES NO DEFENSE IN EQUITY.**

Appellees' brief makes much of their alleged defense of laches, without showing or contending equity would be done any creditor or any person in the religious society by such doctrine.

Appellees' contention would confer jurisdiction by laches where otherwise there is none.

Appellees' contention would preclude the Court from inquiring into the misuse of its temple, its processes, and the religious persecution in violation of the First Amendment, United States Constitution—a continuing series of acts and conduct—for they contend laches precludes any inquiry. In effect this contention gives the Appellees Trustees in Bankruptcy a vested prescriptive right to flaunt and continue to flaunt the Bill of Rights set forth in the Constitution, to misuse and continue to misuse the Court's temple as an inquisition as to religious beliefs, to strip and continue to strip those in the religious society of their property and their current earnings, to apply and con-

tinue to apply and urge rules of substantive and procedural law according to the individual's current religious beliefs and affiliations, to ransack and continue to ransack individuals' papers and to suppress and continue to suppress the religious literature. The statute of limitations in California is 2 years on an oral or implied contract (C.C.P. 339), 3 years for trespass, injury or taking of property (C.C.P. 338), 4 years on a written contract (C.C.P. 337) and 5 years for possession of real property (C.C.P. 336). Suits or proceedings against a person who acts as a trustee in bankruptcy must be brought within 2 years after the estate is closed (11 U.S.C.A. 29d). If laches be applied by analogy to the statute of limitations there remains ample time to seek redress and protection from any of the wrongs by these proceedings, for they may be brought within 2 years after the estate is closed, and it promises to be a long time before even the instant estate may be closed.

Laches is a bar to the use of equity as a sword, not its use as a shield.

*Magee v. Brenneman*, 188 Cal. 562, 206 P. 37.

30 C. J. S. 524, Equity, Sec. 113,  
in which it is said:

“The doctrine of laches is available only as a bar to affirmative relief; and hence the plaintiff cannot urge laches to bar a right asserted by the defendant merely by way of defense \* \* \*”

In the instant case, Appellants are seeking a shield by way of defense. Appellants were among those haled into Court by the Appellees, charged by a summary proceedings in which Appellees claimed their



property forfeited for religious beliefs and affiliations. Appellants were among those interrogated in the inquisition. Appellants were among those whose defenses were struck because of religious beliefs, yet permitted to others who had renounced their religious beliefs and promptly disassociated themselves from those in the religious society. Appellants were among those who suffered forfeiture upon the grounds of affiliations with the religious society—the grounds stated by the Referee in these cases. The Petersens refused to make donations of their earnings from their restaurant they built themselves and ran themselves, and were compelled by the Referee to impound their own earnings from their own current services. Patrick's stock in trade in his occupation as a plumber was seized and claimed forfeit for religious affiliations. The defense of religious persecution and the lack of jurisdiction in bankruptcy to adjudicate the Church were raised in these proceedings before the Referee in 1946. Appellants took their respective reviews from the Referee's orders and these reviews came on for hearing in the District Court on November 14, 1947. To clearly present their defenses and their personal constitutional rights, the matter was properly presented as a motion; and the factual matters occurring up to that time were offered in support of that motion. Appellants were using but a shield to the religious persecution and to the adjudication which was the instrument used against them and others in their religious society (Appellants' Opening Brief, pp. 20-22). The motion was presented along with the two review matters before the District Court, at the same



time, and based in part upon the records of the matters on review.

The Appellees seek to make much of the District Court's findings of fact that laches precludes Appellants' defense of their personal liberties and their religious society. However,

(a) There was no evidence offered by the Appellees in the District Court in support of their contention, and they rely upon judicial notice of their self serving declarations made in their *ex parte* report to the Referee.

(b) In such a bankruptcy proceedings, the Appellate Court reviews the evidence and forms its own independent opinion.

*Security Bldg. & Loan Assoc. v. Spurlock* (9th Cir.), 65 F. 2d 768,

in it the Court said:

"It is the duty of the court on this appeal to review the evidence and form its independent judgment upon the sufficiency thereof to support the adjudication \* \* \*"

No hard and fast rule has been laid down by Courts when the defense of laches is raised. It is not raised by a determined period of time. There is one common element in all the cases, involving this defense; there must be not only unnecessary delay on the part of the plaintiff but also a change of conditions during the period of delay as to make it inequitable to permit the plaintiff to enforce his claim.

*London & San Francisco Bank v. Dexter Horton Co.* (9th Cir.), 126 F. 593, cert. denied 194 US 631.

Laches is not a bar against a beneficiary of a trust, and the right of action by a beneficiary for protection of property in a trust does not arise until there is open disavowal of the trust.

*Merritt Oil Corpor. v. Young* (10th Cir.), 43 F. 2d 27.

A delay of 10 years in a creditor's attack upon a railroad reorganization under the supervision of equity, will not raise the defense of laches. The doctrine of laches rests upon equitable principles which are neither arbitrary nor technical, and what amounts to laches depends largely upon the circumstances of each individual case and ultimate inquiry being as to which side would fall the balance of justice in sustaining or denying the defense. No delay of the plaintiff creditor induced any stockholder or bondholder to go into the railroad reorganization, and thus there was no injury from the delay.

*Northern Pac. Ry. v. Boyd*, 228 US 482, 33 S. Ct. 554, 57 L. Ed. 931; see 9th Cir. opinion, 117 Fed. 803.

The doctrine of laches turns on the individual facts in each case and cannot be used as an instrument of oppression.

*Cleveland Clinic Foundation v. Humphry* (CCA-Ohio), 97 F. 2d 849, cert. denied 305 US 628.

No absolute rule applies to the defense of laches or staleness of demand; and equitable principles govern. It cannot be invoked to defeat justice.

*Hoehn v. Crew* (10th Cir.), 144 F. 2d 665.

If the suit in equity is brought within the analogous statutory period of the statute of limitations, the burden is on the defendant to show prejudice from the changed conditions, due to the delay.

*Shell v. Strong* (10th Cir.), 151 F. 2d 909.

Mere lapse of time alone does not constitute laches.

*Winget v. Rochwood* (8th Cir.), 69 F. 2d 326;

*Kansas City Ry. v. May* (CCA-Ark.), 2 F. 2d 680;

*City of Roswell, N. Mex. v. Mountain Sts. T.*

*& T. Co.* (10th Cir.), 78 F. 2d 379;

*Russell v. Todd*, 309 US 280, 84 L. Ed. 752, 60 S. Ct. 527.

## II.

There are two kinds of jurisdiction, that of the subject matter and that of the person. Lack of jurisdiction as to the subject matter to adjudicate bankruptcy in the case at bar by reason of the Constitutional provisions in the Bill of Rights, and the nature of a religious society and its means of holding property through a temporal agency have been fully covered in the opening brief. Jurisdiction to adjudicate in bankruptcy, over subject matter not within that jurisdiction, cannot be conferred by laches.

Lack of jurisdiction for want of the person before the Court at the time of the attempted adjudication, is also pointed out in the Opening Brief. The spiritual body and those in it are the true owners and those with the full right of enjoyment of all the property; and the temporal agency is a subservient repository for holding title to property. Bankruptcy does



not pass property held in trust by the bankrupt for another. Laches does not confer jurisdiction over the spiritual body and those in it.

(a) Even if the corporation temporal agency should own property of its own, free of any trust for the spiritual body, which would not be possible under California law, the corporation president cannot put the corporation into bankruptcy without the consent of the corporation. The 9th Circuit rule, as pointed out in the opening brief, is that where there are restrictive statutes as there are in California as to the power to dispose of all of the assets only with stock holders' consent, the stockholders or the members (if not a stock company) must consent, otherwise there is no jurisdiction by voluntary petition in bankruptcy. If there is no jurisdiction of the person, laches cannot confer it.

(b) The owners of the trust—the spiritual body and those in it were not before the Court and did not authorize nor consent to any such bankruptcy proceedings. This lack of jurisdiction of the person cannot be conferred by laches.

(c) There was no reality of consent of the corporation's president to the voluntary adjudication of the church temporal agency. The essence of fraud or mistake is the lack of this reality of consent which prevents acts of a person from having the effect they otherwise would have if there were reality of consent. The testimony of attorney and client appear in the record. A state receivership was aimed against Mr. Bell's management of the Church money and property and Mr. Bell was led by his counsel to believe that a



Chapter Bankruptcy proceedings was the placing of certain assets in the care of the Court to guarantee the payment of listed creditors (Appellants' Suppl. p. 83). There was an attempt to look to the Federal Court for protection of freedom of religion (Suppl. p. 89), and Chapter proceedings would not interfere with the Church activities and the Church property would be protected from dissipation (Suppl. pp. 90-91). Voluntary proceedings were discussed very briefly after it appeared the Court would not permit Chapter proceedings (Suppl. pp. 92-3). On bankruptcy adjudication only sufficient property would be liquidated to pay the current debts of \$111,000, and the religious rights would be protected (Suppl. p. 95), and upon this sale, the Court would release the Church (Suppl. p. 96), and the religious uses and religious part would remain untouched (p. 96). Mr. Utley testified he advised Mr. Bell that a Chapter proceedings left the debtor in possession, though a receivership might be advisable, that a majority of the \$111,000 unsecured creditors had to consent to the plan, that an adjudication would require the liquidation of so much of the estate as was necessary to pay the obligations and administration expenses and if it was a simple case with \$3,500,000 of property to pay \$111,000 debts, simple cases could be disposed of very hurriedly (pp. 99-104); that he would receive fair and just treatment in the Bankruptcy Courts (p. 104) and no religious persecution; and it would be less expensive in the Bankruptcy Courts (p. 105). That a voluntary adjudication would still permit the plan of arrangement (p. 107),

that bankruptcy was the line of demarcation as to what belonged to the estate and the corporation (p. 107), and the religious angle was thoroughly discussed (p. 108).

No person in charge of a religious society's temporal agency holding the property in trust for the spiritual body and those in it could be permitted to transfer by adjudication what he thought was \$3,500,000 for \$111,000 debts. That actual facts show a layman believing that the Bankruptcy Courts concerned themselves with the property claims and personal rights and religious liberty of bankrupts; that only \$111,000 would be sold, Trustees' fees to be the 1% or 2% statutory maximum of the \$111,000 of property to be sold, and the \$3,400,000 would be untouched, remain in the use of the spiritual body and those in it subject to the religious uses and trust, and released very hurriedly.

How far different is bankruptcy in actual practice. Few creditors ever get more than a small per cent of their claims; and they may get nothing in this estate if administration continues as it has. All property must be liquidated—sold—the Appellees claim, free of its religious uses. All earnings and income were claimed by the Trustees after bankruptcy, and Petersens who would not give it were enjoined from taking even the products of their own current earnings. The Trustees in a year and a half have had \$2,207,936.38 cash pass through their hands, and spent on administration, costs, attorney fees, etc. \$277,089.09 yet not paid a cent of dividend on this \$111,000 debt. Claims for taxes and "dissenters"

have sprung up and the latter have been aided and the former received no bona fide attempt to defend nor hastened to trial. The Trustees insist upon control of the litigation in these matters and prevent those in the religious society from joining in the tax claim defense. The Trustees in Bankruptcy put on the mantle of the Church and collected donations and services and ran the temporal affairs of the Church until the Court stopped them in September 30, 1946. Such a lush plum had fallen into the laps of the bankruptcy gang when their business was at a low ebb, that the Church officials and all in the loyal believers group must be harried, subjected to the inquisition, and the Lord's purse wasted, summary proceedings instituted against them and any excuse for litigation, incurring of fees or costs resorted to to prolong the proceedings so long as a cent remained.

There is a lack of decisions as to a trustee of an express trust placing the corpus of the trust into bankruptcy, probably because a court of equity supervises trusts and marshals assets and ratably distributes them among creditors of the trust. Although a person may, solvent or insolvent, dispose of his property by a decree of forfeiture through an adjudication in bankruptcy, a trustee of an express trust is placed upon a far different level in managing and handling trust funds than he is in handling his own property. If he has the bare legal title in trust for another, a trustee cannot take the amounts over the debts and dispose of them as he wishes without regard to the beneficiary or the bene-



ficiary's interest. So in the instant case, the trustee of an express trust—the corporate temporal agency for a religious society under the laws of California—cannot by its voluntary act whether a conveyance or an adjudication in bankruptcy dispose of the solvent corpus of the trust. This appeared affirmatively from the Chapter Petition with Schedules attached and from the voluntary Petition (Appellants' Suppl. 2-15) and this lack of jurisdiction appearing affirmatively cannot be waived nor jurisdiction conferred by laches. An interesting decision in line with this is the case of *Lord v. Hardie*, 82 N. Carol. 241, 33 Amer. Rep. 682 where the Court granted recovery of possession of silver communion-ware seized by a sheriff under execution on a judgment for a minister's wages. The Court pointed out the Church trustees, a quasi-corporate body, were the naked depositories of the legal title with capacity to act for the congregation; that any purchaser at execution sale would take subject to the religious trust; that the Church trustees were not able to devote the property to other purposes; and the Court raised the point that property dedicated to religious use might under the constitutional freedom of religion be protected from legal seizure.

### III.

Under the Appellees' contention of the doctrine of laches there are two classes of citizens in these United States:

(1) Those who are litigious, who immediately file suit on the first provocation, and who resort to legal



remedies on the first threatened infringement of their personal rights.

(2) Those who avoid litigation if possible; who when made parties defendant or respondent raise their Constitutional questions and seek protection of infringement of their personal liberties; who present the question by proper remedy as a motion to attack an adjudication made without jurisdiction and an abuse of the Court's temple in a religious persecution. Who do so only when forced to, and then only when the evidence has been collected that will be irrefutable and conclusive.

The former group are the only ones who can enjoy the liberties guaranteed in the Bill of Rights, U. S. Constitution; and the latter by this contention are a separate class of citizens who by reason of the equitable doctrine of laches have no such personal liberties nor standing in court to protect them or ask for relief or to hold a shield against the positive affirmative acts of those who would strip them of these basic liberties, by misuse of the Federal judiciary's bankruptcy procedure. We submit that the freedoms guaranteed by the Bill of Rights, in the U. S. Constitution are not cut from that perishable type of material. Nor are there two classes of people in this great nation, one to whom the Constitutional Bill of Rights applies and another class to whom it does not apply. These Constitutional and inherent rights apply equally, to all persons, and can be lost only by bloody revolution in which our present system of jurisprudence and our judiciary are deposed by force of arms.

**CONCLUSION.**

The Appellants as persons in the religious society are proper persons to appeal to this Honorable Court in their own defense and in defense of their religious society.

Jurisdiction of the subject matter or the person, or both, where none exists, cannot be conferred by the doctrine of laches. No Trustee in Bankruptcy can obtain a prescriptive right to flaunt the Constitutional Bill of Rights nor misuse the Court's temple for a religious persecution.

This Honorable Court does not divide those in this great nation into two classes: the litigious who sue on the first provocation, and those who await until made defendants to raise the Constitutional question and any want of jurisdiction; that only the former class are entitled to their Constitutional Bill of Rights, and the latter class have no rights under the Constitution. On the contrary, no person under our Constitution loses the freedoms guaranteed by the Bill of Rights, but all are treated equally.

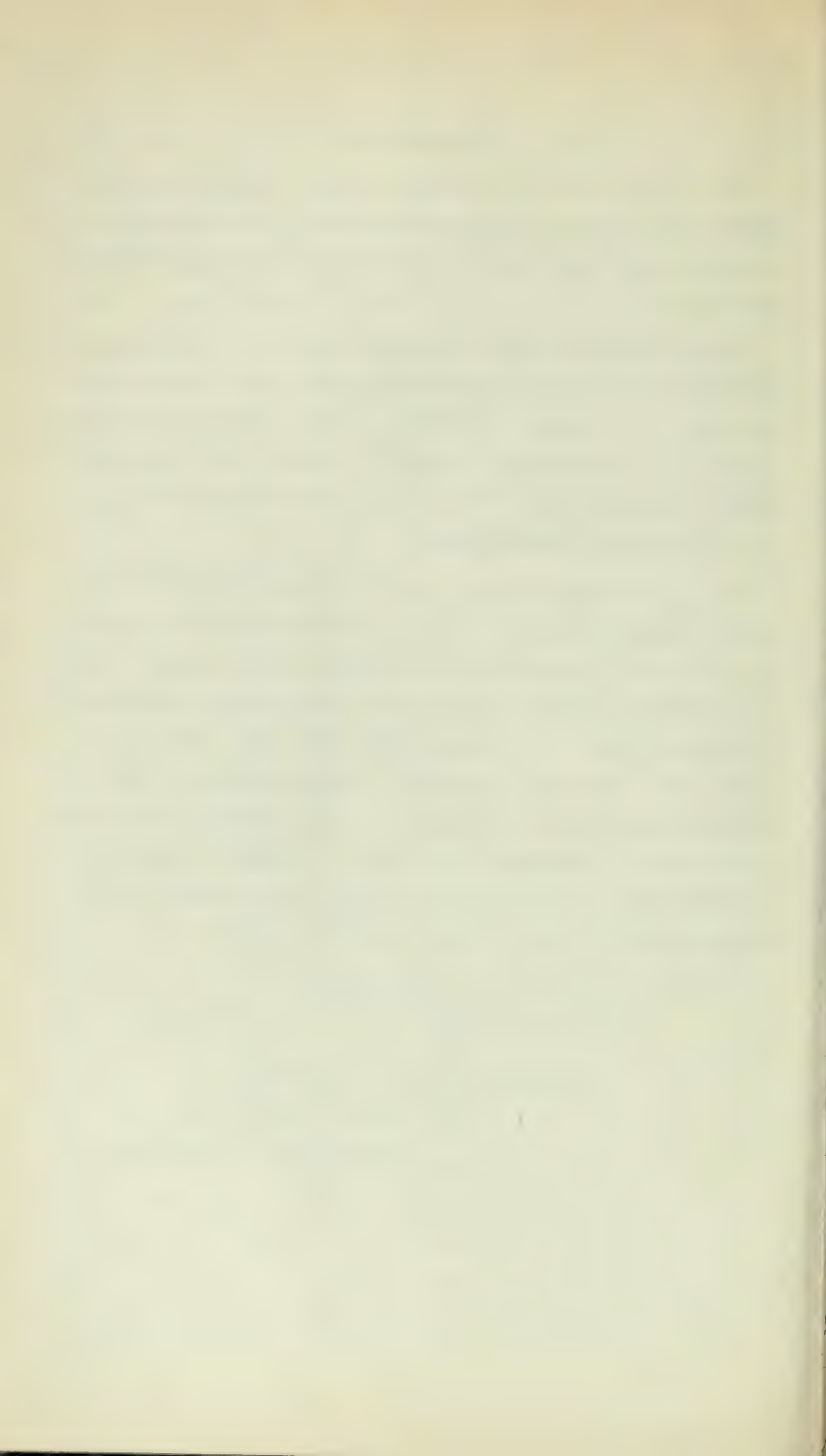
Dated, San Francisco, California,

October 8, 1948.

Respectfully submitted,

HOWARD B. CRITTENDEN, JR.,

*Attorney for Appellants.*



No. 11,874

IN THE

United States Court of Appeals

For the Ninth Circuit

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In the Matter of

CHRIST'S CHURCH OF THE GOLDEN RULE,  
a California Non-Profit Religious Corpora-  
tion,

Bankrupt.

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PETER PETERSEN, MRS. PETER PETERSEN and  
GEOGRE D. PATRICK,

*Appellants,*

VS.

PAUL W. SAMPSELL, L. BOTELER and MCIN-  
TYRE FARIES, as Trustees in Bankruptcy  
of the Estate of Christ's Church of The  
Golden Rule, Bankrupt, and CHRIST'S  
CHURCH OF THE GOLDEN RULE, Bankrupt,  
*Appellees.*

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APPELLANTS' PETITION FOR A REHEARING.

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HOWARD B. CRITTENDEN, JR.,

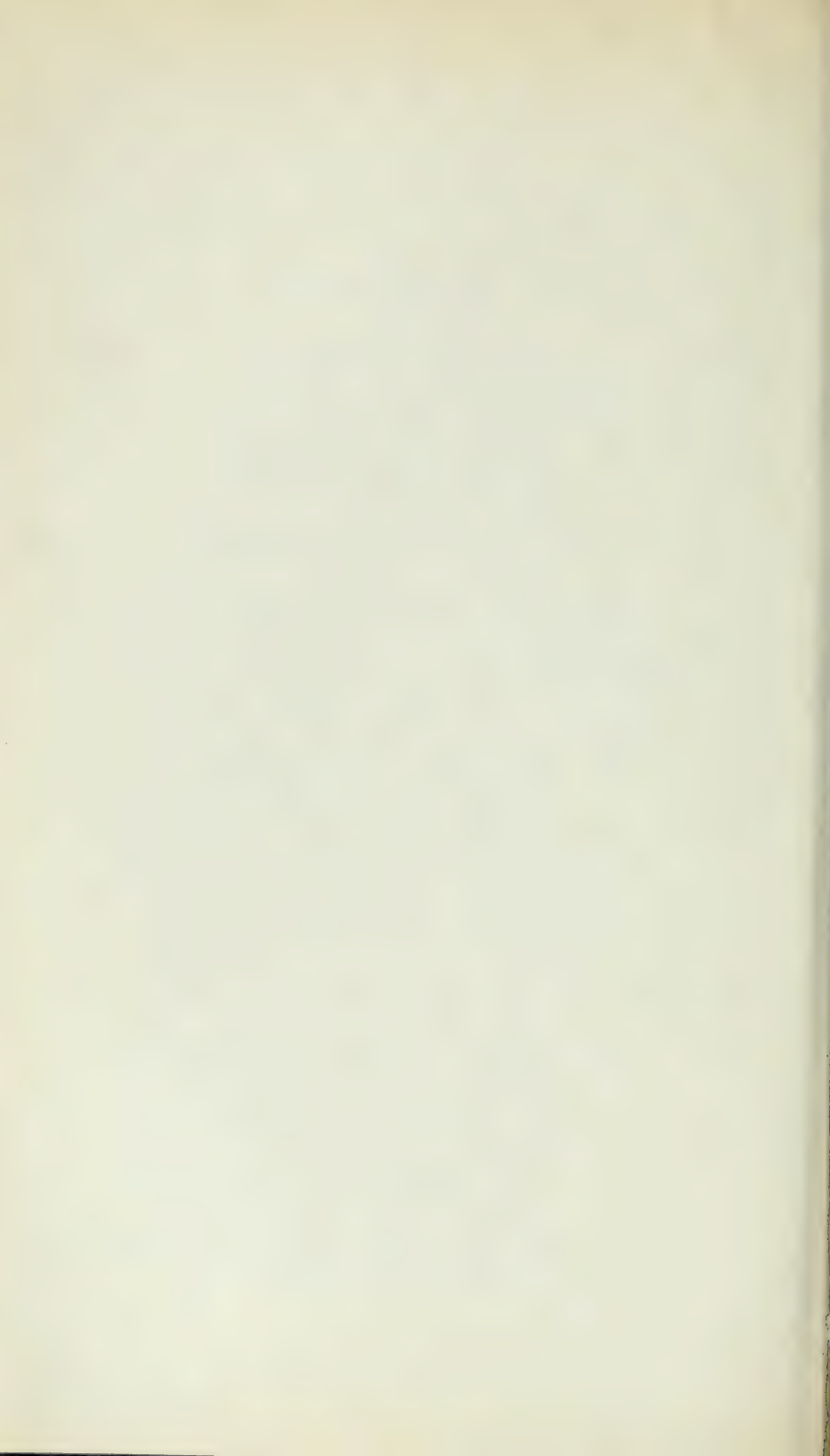
Central Tower, San Francisco 3, California,

*Attorney for Appellants  
and Petitioners.*

FILED  
DEC 14 1948

PAUL P. O'BRIEN





## Table of Authorities Cited

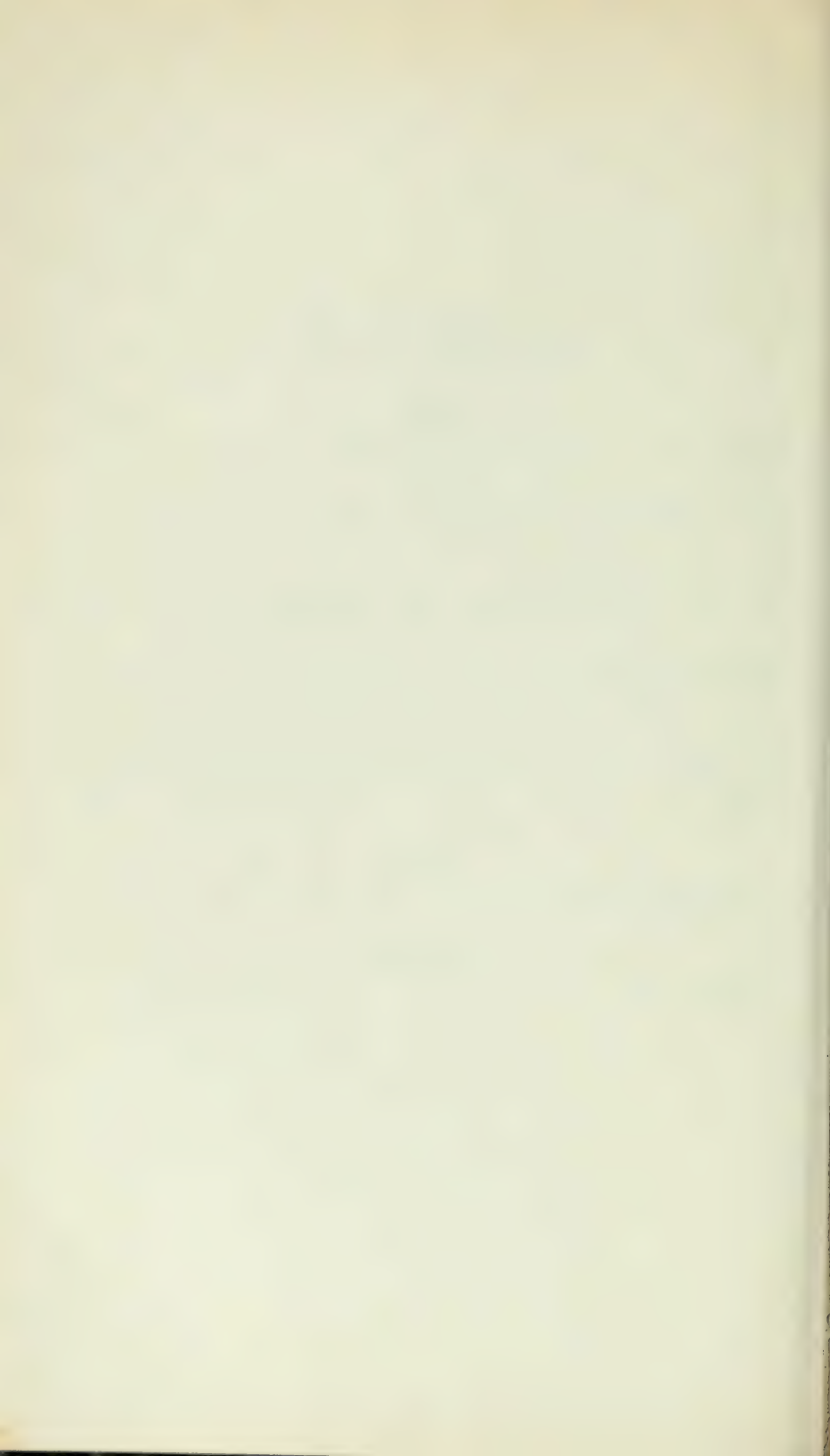
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*Appellees.*

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**APPELLANTS' PETITION FOR A REHEARING.**



*To the Honorable William Denman, Presiding Judge,  
and to the Honorable Associate Judges of the  
United States Court of Appeals, for the Ninth  
Circuit.*

The Appellants, Peter Petersen, Mrs. Peter Petersen and George D. Patrick respectfully petition the above-entitled Court for a re-hearing in the above-entitled matter, and for grounds, show :

That the above-entitled matter is an appeal from the District Court's denial of a motion to vacate the adjudication; originating in summary proceedings commenced by the Appellee Trustees in 1946 wherein their property consisting of Patrick's stock in trade as a plumbing contractor and the home and business of the Petersen's known as Petersen's Cafe, Maywood were claimed, along with other grounds as forfeited for their religious beliefs and affiliations with the religious society whose temporal agency fell into the hands of the Bankruptcy Court. Their two respective summary proceedings came on for review before the District Court on November 14, 1947, and to clearly present this defense, the matter was presented as a motion, based upon the records in their respective reviews pending before the District Court, and in part upon evidence offered and some taken before the District Court.

Appellants' counsel believed that the various grounds were well founded in law, cited 47 authorities in the Opening Brief and 39 in the Reply Brief, and several additional at the argument on the 8th

of November. It involved many serious, important and basic questions of law including basic Constitutional rights of the Appellants:

(1) The Constitutional right to Freedom of Religion, First Amendment of the U. S. Constitution which included the legality of the judicial arm of the Federal Government supervising, running and operating and by decree of forfeiture taking the affairs of a church and its ecclesiastical society. It involved the abuse and perversion of the processes of the Federal Court through its Bankruptcy administration in a series of acts involving a religious persecution without precedence in the history of Anglo Saxon jurisprudence.

(2) A Church corporation under the laws of California holds as a temporal agency, bare legal title in trust to manage for and in the interests of the spiritual organization and those in it and is wholly subservient thereto.

(3) It involved the power of a temporal agency's official to convey some two to three millions of dollars of property and money held under an express trust, to satisfy a mere \$110,000 in debts; and a total misunderstanding by the official of the nature and character of his acts in doing so in a dispute with some state official. It involves such attempted acts, done without the consent or vote of the spiritual organization, or those in it, or of the corporate members of the temporal agency.

(4) It involved a procedure by the bankruptcy administration and those acting for it, shown by clear statements of both the Referee and counsel for the Trustee:

(a) The religious beliefs of the Church were held fraudulent for want of judicial proof in a heresy trial; and all those in the religious society were divided into two groups depending solely upon current religious beliefs of the individuals. Those who renounced their beliefs were "dissenters" and thus entitled to claim any property in the estate they wished. Those who retained their religious beliefs and did not promptly dissociate with others holding those beliefs, in which case they (including the appellants) were stripped of their property in summary proceedings predicated for jurisdiction upon religious beliefs (as shown in the Petersen review record), and subjected to the inquisition procedures peculiar to the Bankruptcy administration originally calculated to deal with dishonest debtors and people seeking to effect frauds and preferences. Extensive use of this inquisition was used as a means of religious persecution against those retaining their religious beliefs or associating with those holding those beliefs.

(b) The temporal affairs of the Church were put into the hands of two professional bankruptcy liquidators and a brewery owner, none with sympathy for the religious views of the Church, who ran the affairs of the Church from the bankruptcy until the end of September, 1946, when this practice was stopped by



the District Court. Over \$2,000,000 of the Lord's purse was disbursed by the Trustees in the first year and a half of their stewardship of the religious society's financial affairs; included in this were donations coerced from those in the Church, both money and services, under threats that the religious society would be disbursed and broken up if not made to the Trustees in Bankruptcy.

(c) The ransacking, without legal authority or justification, of the personal papers of those in the religious society by the Trustees and their paid detectives after November, 1945, and as late as Christmas, 1946, and the seizure and suppression of the religious literature of the religious society.

(5) The District Court upon the Petition for a Chapter XI proceedings which was improperly brought, in effect dismissed the proceedings and adjudicated the Church temporal agency a bankrupt, without following 11 USCA 776 which requires notice to creditors and interested parties (which would include the appellants who were among those in the religious society—Affiliates) and that the proceedings be dismissed or an adjudication, not in the conjunctive.

Rather than go into length on these points, we merely list some of the more important points covered in the Appellants' two briefs and the record; and respectfully draw the Court's attention to the matter covered in the briefs.

Upon oral argument, one of the members of the Court indicated that the Appellants had not shown



sufficient interest to bring the motions. We need only point to the Reply Brief, pages 1 to 4 inclusive, to the record and to the cases cited at the oral argument.

An application to the Court for an order, is a motion, which under the Federal Rules must be in writing. This requirement of a writing is met if stated in the written notice of the hearing.

*Federal Rules of Civil Procedure, 7(b).*

The Motion was stated to be upon the records in the two reviews and upon evidence to be introduced and the grounds stated. The records on review amply show the individual persecutions for religious beliefs and affiliations; and that each is a person in the religious society.

Furthermore, the bankrupt church corporate temporal agency was a party to the original motion. (Appellants' Suppl. p. 33, where the appearance of counsel for the bankrupt is shown). The president of the corporation in bankruptcy was called by the Appellants as a witness and testified for them (Appellants' Suppl. p. 81 et seq.); and the bankrupt's counsel was called as a witness by the Appellees' counsel and testified against Appellants. (Appellant's Suppl. p. 98, et seq.) The Bankrupt Church corporation was a party to the appeal, and its counsel served with briefs, but did not see fit to appear. Under the circumstances where those in control of a Church undertake to divert the property, certainly the beneficiaries of the trust, those in the ecclesiastical

society can seek to protect their own constitutional personal rights from invasion and those of the others in the society as well.

In *Beatty v. Kurtz*, 2 Peters 566, 7 L. Ed. 521, an action was brought by several plaintiffs to protect property of their Lutheran Church, alleging they were trustees of the Church. The Court stated that the question of proof of their capacity of trustees need not be considered as mere parishoners may sue without joining all others in the Church; and that in a voluntary association, some can sue for the others in the society.

In *Lilly v. Tobein*, 103 Mo. 477, 15 S.W. 618, the Court held that individuals in the Church could sue to establish a will passing land to the Catholic Church of Lexington, Mo. The Missouri law is the same as the California law enunciated in *Wheelock v. First Presbyterian Church*, 119 Cal. 477, 51 P. 841, that the ecclesiastical group is not incorporated, and the corporation acts only as an agent for the temporalities, and an individual in the Church may sue to protect and establish property rights of the Church.

The Eighth Circuit in *Schell v. Leander Clark College*, 2 F. (2d) 17, held that a single person in a religious society can sue or defend on behalf of all in the congregation (Church of United Brethren of Christ, etc.); that a single person in the religious society could enjoin the trustees of the incorporated college from conveying the endowment and campus of the college to others; and the Board of the corporation are mere administrative agents for the

Church and its members, empowered to do certain acts as mere agents.

In *Fink v. Umscheid*, 40 Kan. 271, 19 P. 623, plaintiff, one in a congregation from whom money was collected to acquire a church farm, so that the income from its rental could support the parish and priest of the Catholic Church, could sue and recover from a purchaser who bought a portion of the farm from the Bishop. In that case the Court took testimony as to the intentions of the parties as to the terms of the trust; the Bishop claiming the trust was for education of poor young persons and he sold the land to carry out the trust; and the other contention was that the priest solicited the contributions for the farm to support the parish and its priest. The Court found that the trust was for the latter and the conveyance was in contravention of the trust. In such a Church, a person is a part of a congregation by merely attending services, and may transfer to any other congregation by merely attending services in the other church of the same denomination.

In *Nance v. Busby*, 91 Tenn. 303, 18 S.W. 874, a Baptist congregation split and suit was brought by some individuals in the minority group to impress the trust upon the Church property for their individual group. The Court held that the Church corporation holds title in trust and the right to sue depends not on corporation membership but on the relationship to the Church—the ecclesiastical society. (This is the rule discussed in *Wheelock v. First Presbyterian Church*, 119 Cal. 477, 51 P. 841.) Thus the rights as plaintiffs of the Petersens and Patrick de-



pendes not upon any claimed membership in the bankrupt corporation, as Appellees' Counsel contends, but upon being parishioners or those in the religious society.

An extremely interesting and important decision is that of *Mannix v. Purcell*, 46 Ohio St. 102, 19 N.E. 572. In that case the Roman Catholic Archbishop of the City of Cincinnati incurred debts and made a general assignment for the benefit of creditors. Some 200 parcels and tracts of land were involved, and it involved the legality of mortgage by the assignee and related questions. The Court held that the property was held under a *trust* and did not pass by the assignment for the benefit of creditors of the archbishop. Though some congregations were incorporated, others were not; and the congregations were constantly changing, a person merely attended a church and that constituted the joining of the congregation. He or she transferred by attending another; and those in a congregation were transitory and indefinite and constantly changing. Yet the Court held that one in the congregation of such a church could be a party to the action, sue and defend on behalf of the ecclesiastical group; that a pious trust was of necessity indefinite in its beneficiaries but any in the group were proper parties to enforce the trust and protect the society's property.

But the above-entitled Court did not make its decision upon such a point in its opinion of a mere dozen lines. The meat and substance of the decision is contained in a single sentence "The motion did not state, nor does the record disclose, any fact or



facts entitling appellants to an order setting aside the adjudication.”

The decision shows that in a case adjudicating a Church a bankrupt, the first precedent or decision involving a religious society in such a position, all the facts shown in the record do not deserve further comment or discussion.

It could be that the case is so without merit as not to deserve any greater opinion or decision or comment. However, it is the custom of the Court in its decisions to afford some reasoning or comment to the various contentions. It might leave the unjust inference that when the violation of the highest of all the personal liberties guaranteed by the Constitution have been subjected to an unprecedented violation, that the personnel of the Court were afraid to discuss or consider these violations. The Court has never shown cowardice nor avoided a plea of help from the persecuted for their Constitutional heritages. It is the avoidance of showing of the “white feather” to his buddies that causes soldiers to face death and even go into certain death in time of war. It was the fear of the judges in the Third Reich, under a system of jurisprudence so highly praised by Dean Wigmore before the judges refused to pass upon acts of the Geheimdestaatspolizei that resulted in the loss of all personal liberties in that nation. The Bill of Rights protected in our Constitution is no better than the Courts that enforce them. Does this decision mean that some Churches and those in them now cannot appeal to the Courts and have a decision on their constitutional rights? Does this mean that some per-

sons because of their religious affiliations cannot have a decision as the Court ordinarily gives with its usual well reasoned statements and grounds for its holdings? Does this mean that there will be perpetuated upon the printed decisions of the Federal Courts a case of first impression of a religious society being placed under the control and domination of the bankruptcy courts which so summarily deals with such an important question?

Does the Court wish a decision involving such an important question of first impression to stand with such a summary decision and holding? Might it not leave an unjust inference that if the question involves such a basic personal constitutional right as freedom of religion, and such flagrant violations, that the Court is afraid to hear and determine it? Might it not leave the unjust inference that one of the Federal Appellate Courts, next to the Supreme Court, is guilty of cowardice upon such a basic freedom, so recently one of the *causis belli* of such a world conflict?

We ask that the Court, *en banc*, consider a re-hearing, and the effect and nature of the present decision.

Dated, San Francisco, California,  
December 10, 1948.

Respectfully submitted,

HOWARD B. CRITTENDEN, JR.,  
*Attorney for Appellants  
and Petitioners.*



CERTIFICATE OF COUNSEL

Rule 25

I certify that in my judgment the foregoing petition for a re-hearing is well founded and that it is not interposed for delay.

Dated, San Francisco, California,  
December 10, 1948.

HOWARD B. CRITTENDEN, JR.,  
*Attorney for Appellants  
and Petitioners.*





No. 11,875

IN THE  
United States Circuit Court of Appeals  
For the Ninth Circuit

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SYLVIA RINGSTAD,

vs.

CHARLES W. GRANNIS and ZELMA GRANNIS,

*Appellant,*

*Appellees.*

BRIEF FOR APPELLANT.

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FILED

JUN 10 1948

PAUL P. O'BRIEN,

CLERK



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No. 11,875

IN THE

**United States Circuit Court of Appeals**

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---

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---

**BRIEF FOR APPELLANT.**

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This action was filed in Fairbanks, Alaska in 1945; a trial was had, and an appeal taken to the United States Circuit Court of Appeals and filed in said Court under No. 11,283. This case was briefed and the Circuit Court of Appeals decided the case on the 31st day of January, 1947, and is now found in 159 Fed. (2d) at page 289. After reversing the case it was remanded for a new trial.

The action was one in ejectment and for damages for wrongfully trespassing on real estate and wrongfully withholding possession thereof. The jurisdiction of the District Court of Alaska is specifically provided for in the Compiled Laws of Alaska, 1933, as amended, especially Sections 3761, 3764 and 3766, which are as follows, to-wit:

“Sec. 3761. Who may bring such action and against whom. Any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action. Such action shall be commenced against the person in the actual possession of the property at the time, or if the property be not in the actual possession of anyone, then against the person acting as the owner thereof. (1133-CLA).”

“Sec. 3764. Defendant not to be allowed to give evidence in certain matters, unless. Judgment, when conclusive against landlord. The defendant shall not be allowed to give in evidence any estate in himself, or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer. If so pleaded, the nature and duration of such estate, or license, or right to the possession shall be set forth with certainty and particularity required in a complaint. If the defendant does not defend for the whole of the property, he shall specify for what particular part he does defend. In an action against a tenant the judgment shall be conclusive against the landlord who has been made defendant in place of the tenant to the same extent as if the action had been originally commenced against him. (1136-CLA).”

“Sec. 3766. Damages recovered; improvements. The plaintiff shall only be entitled to recover damages for withholding the property for a term of six years next preceding the commencement of the action, and for any period that may elapse from such commencement to the time of giving a verdict therein, exclusive of the use of permanent improvements made by the defendant.

When permanent improvements have been made upon the property by the defendant, or those under whom he claims, holding under color of title adversely to the claim of plaintiff, in good faith, the value thereof at the time of trial, not exceeding such damages, shall be allowed as a set-off. (1138-CLA)."

The right of appeal to this Court is provided for by Chapter CXIX C.L.A. 1933, at page 802.

This appeal was duly perfected and lodged in this Court within the time allowed by law, and by the extensions granted by the District Court of the Territory of Alaska.

The points relied upon for reversal are set forth in the printed transcript of record, commencing on page 206; the first of which is as follows, to-wit:

"STATEMENT OF POINTS RELIED UPON  
FOR REVERSAL.

I.

The Court erred in refusing to instruct the jury to return a verdict for the plaintiff for the recovery of the property at the close of the testimony, for the following reason:

a. The plaintiff proved, and it was not denied, in any of the defendants' testimony, or elsewhere, that Lot Three (3), Block Ninety-five (95), Townsite, of Fairbanks, belonged to her; she introduced a complete chain of title conveying this property down to her in support of her ownership.

b. She proved open, notorious and continuous possession in her, and her predecessors for



about thirty-five years continuously until the dispute arose after the defendants moved on Lot 2, Block 95, next door east of her old home in 1945.

c. She established the fact that the property was enclosed by a fence for many years prior to the time she purchased it in 1933, and up to, and including May, 1945, the date the trouble arose.

d. She established the exact location of the old fence for about thirty-five years prior to 1945.

e. She testified, and no one ever disputed the fact, that fence was exactly on the line of the property that she claimed in this suit from 1933 at the time she purchased it, to and including the spring of 1945; or a total of twelve years of open, notorious and undisputed peaceable possession by her.

f. No one, not even the defendants, or their predecessors ever questioned her title or right of possession, until the defendants moved on the adjoining property in 1945 and tore the old fence out, and then questioned the right of possession of plaintiff as is shown on the plat Exhibit 'C' of a part of the old fenced property claimed by her, which property questioned by the defendants, consisted of the part east of the line shown on said plat, which commenced at the northeast corner of said property and extends in a southerly direction across said property to the southwest corner thereof, which includes exactly one-half of said property in a wedge shape 22.9 feet at the southerly end and to a sharp point at the northerly end. This takes in two-fifths of the Ringstad house at the south end thereof. The testimony stands admitted that the house has stood in its exact position for more than thirty years last past,

and also takes in the driveway, clothes line and the sewer that have been there for many years until the dispute between the plaintiff and defendants arose in May of 1945, and this line had never been in dispute until then."

"Therefore, the Court erred in not sustaining plaintiff's motion for an instructed verdict as to the right of possession of the real estate involved, it having been established and not denied that she had continuous, open, notorious prior possession for more than twelve years prior to the trespass by defendants in May, 1945, and plaintiff's predecessors had had open, notorious, continuous possession for over thirty-five years prior to 1945."

In support of this point for reversal, the appellant relies on the undisputed evidence as shown by the bill of exceptions, which is definite and certain, and not denied in any way and conclusively establishes the fact that the plaintiff, Sylvia Ringstad, purchased the property here involved, being described as Lot 3, Block 95, Townsite of Fairbanks, in the spring of 1933 and moved thereon; that the same was enclosed by an old fence at that time; which fence stood there until the spring of 1945 when the defendants moved on the adjoining property lying immediately east thereof and had a survey made; which disclosed that the old fence dividing the two properties, that had stood there for a period of approximately thirty-five years, was not on the line as it was shown upon the plat made from the survey of L. S. Robe in 1909. (See T. R. p. 198.)

This undisputed evidence shows that there was no controversy of any kind between the plaintiff owning

Lot 3 and the various persons who owned Lot 2, and no one ever questioned the established boundary line marked by the old fence until the spring of 1945; at which time a controversy arose after a survey had been made disclosing the fact that the thirty-five year old fence was not on the line between Lots 2 and 3 of Block 95, Townsite of Fairbanks, as shown on the plat made from the survey notes of L. S. Robe of 1909, and certified to by Henry T. Ray, on the 17th day of August, 1910.

This leaves a period from the 12th day of April, 1933 (the date of the Administrator's Deed from John Butrovich, Jr., Administrator of the estate of Henry Kortlitzky, deceased, to the plaintiff, Sylvia Ringstad (T. R. p. 81) up to the spring of 1945, or a period of more than twelve years of continuous, open, notorious, adverse and undisputed peaceable possession in the plaintiff, Sylvia Ringstad.

Then by a deed admitted in evidence, over the objections of the plaintiff, which deed was executed by Jack Tobin to C. W. Grannis and Zelma D. Grannis, the defendants herein, which deed was dated the 18th day of May, 1945 (T. R. p. 171), which is the first and the earliest date to be shown by the evidence that the defendants ever claimed an interest in the said Lot 2 adjoining the property here involved on the east, and the first time that the boundary line established between these properties was ever questioned.

This being established and undenied, it is the appellant's contention that the Court should have sustained the plaintiff's motion for an instructed verdict as to



the right of possession of her property, and the ejection of the defendants therefrom, and the failure to do so was error on the part of the Court.

In support thereof appellant wishes to cite two sections of the Compiled Laws of Alaska, 1933, which are in words and figures as follows, to-wit:

“Sec. 4313. Title by adverse possession. ‘The uninterrupted adverse notorious possession of real property under color and claim of title for seven years or more shall be conclusively presumed to give title thereto except as against the United States. (1874-CLA.)’”

“Sec. 3764. Defendant not to be allowed to give evidence in certain matters, unless. Judgment, when conclusive against landlord. *The defendant shall not be allowed to give in evidence any estate in himself, or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer.* If so pleaded the nature and duration of such estate, or license or right to the possession shall be set forth with the certainty and particularity required in a complaint. If the defendant does not defend for the whole of the property, he shall specify for what particular part he does defend. In an action against a tenant the judgment shall be conclusive against the landlord who has been made defendant in place of the tenant to the same extent as if the action had been originally commenced against him. (1136-CLA.)” (Italics mine.)

The amended answer filed by the defendants after this case had been reversed by this honorable Court did contain an additional clause over and above the original answer. The answer is set out on T. R. p. 7,



and the amended answer is on T. R. p. 9. I call your attention that the only difference in the two answers is, that in the amended answer you will find these words:

“And for a Further Separate and Affirmative Answer and Defense to the First, Second and Third Causes of Action Contained in Plaintiff’s Second Amended Complaint, Defendants Allege: That at all of the time mentioned in Plaintiff’s Complaint (7) and for a long time prior thereto, and until recently when the defendants sold the same, they were the owner in fee simple and in the possession of Lot Two (2) in Block Ninety-five (95) of the Townsite of Fairbanks, Alaska, according to the official map, plat and survey thereof.”

We call your attention that this statute above pleaded, to-wit, Section 3764-CLA, 1933, provides:

“The defendant shall not be allowed to give in evidence any estate in himself, or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer. If so pleaded the nature and duration of such estate, or license or right to the possession shall be set forth with the certainty and particularity required in a complaint. If the defendant does not defend for the whole of the property, he shall specify for what particular part he does defend.”

Immediately preceding this section we find Section 3763, which is as follows:

“Sec. 3763. What to be pleaded in complaint. The plaintiff in his complaint shall set forth the nature of his estate in the property, whether it be in fee, for life, or for a term of years, and for

whose life, or the duration of such term, and that he is entitled to the possession thereof, and that the defendant wrongfully withholds the same from him to his damage in such sum as may be therein claimed. *The property shall be described with such certainty as to enable the possession thereof to be delivered if a recovery be had.* (1135-CLA.)”

It surely cannot be contended that the amended answer raised any issue that was not raised before at the time this case was decided by this Honorable Court in January, 1947.

This answer does not allege that the defendants own any part of the property sued for and claimed by the plaintiff, or make any effort to describe with certainty anything or any part of the property claimed by the plaintiff.

There being no dispute of the established fact that the plaintiff did have exclusive, open, notorious, peaceable and adverse possession of the property claimed by her, and that it was all within her old fence. Then the Court erred in submitting the question of ownership and right of possession to the jury on the wrongful theory that, the acts of the defendants in ousting the plaintiff by tearing down her fence in May, 1945, after she had had peaceable, quiet, adverse, open, notorious, possession for twelve (12) years; was defensive matter and this was error on the part of the trial Court, and in support of this statement, I beg to call the Court's attention to the following cases:

*Campbell v. Silver Bow Basin Mining Co.*, 49 Fed. 47.

“\* \* \* a person in possession may maintain an action to recover possession of real property from which he has been ousted by a mere intruder.”

*Campbell v. Silver Bow Basin Mining Co.*, 49 Fed. 47;

*Wilson v. Fine*, 38 Fed. 789;

*Feehely v. Rogers*, 80 Fed. (2d) 719;

*Price v. Brockway*, 1 Alaska 233.

I believe the universal rule to be, that when a landowner, acting under a mistake as to the true boundary between his land and that of another, takes possession of land of such other, believing it to be his own, incloses it, claims title to it, and holds possession for the statutory period, he becomes the owner, for such possession and claim of title, though founded on a mistake, are adverse.

In the old Oregon case of *Caufield v. Clark*, 17 Oregon 473, 11 A.S.R. 845, sustain this theory, and the Alaska statute, being taken from Oregon, this decision should be at least very persuasive in the case at bar. The first and only syllabus reads as follows:

“Adverse Possession.—One Who by Mistake as to Boundaries enters upon and occupies land not embraced in his title, claiming it as his own for the requisite statutory period, thereby becomes invested with the title thereto by possession, although his entry and possession may have been founded upon a mistake.”

The Supreme Court of Minnesota passed on this question in the case of *Fredericksen v. Hinkle*, 209 N. W. 257. The third, fourth and sixth syllabus reads as follows:



“3. Adverse possession—Possession of successive occupants who are in privity may be tacked to make possession for statutory period.”

“4. Adverse possession — Possession beyond boundary line, under mistake as to true line, but with intent to appropriate, is ‘adverse possession’.”

“6. Adverse possession—Title acquired by adverse possession is legal one, though not of record, and is not lost by ceasing of occupancy.”

I especially call your attention to the sixth syllabus above cited as this seems to have been the confusing part of the trial in this case, both to the Court and the jury, and for that reason, I am quoting from the body of the opinion on page 259, as follows:

“6. To maintain a title, acquired by adverse possession, it is not necessary to continue the adverse possession beyond the time when title is acquired. *The title once acquired is a new title; a legal title though not a record title is not lost by a cessation of possession, and continued possession is not necessary to maintain it.* McArthur v. Clark, 86 Minn. 165, 90 N. W. 369, 91 Am. St. Rep. 333; Dean v. Goddare, 55 Minn. 290, 56 N. W. 1060. The authorities are uniform. 2 Tiffany, Real Prop. (2nd Ed.) 511; 3 Thompson, Real Prop. 2516; 3 Washburn, Real Prop. (6th Ed.) 1994; 2 C. J. 251-258; 1 R. C. L. p. 690, 5; 1 Cent. Dig. Adverse Possession 604, 623; volume 1, First and Second Decennial Digest, ‘Adverse Possession,’ 106. This is said in response to a suggestion that the plaintiff may not have had adverse possession or possession at all at all times after he bought. Title was perfected by adverse posses-



sion many years before he bought. Judgment affirmed." (*Italics mine.*)

The Supreme Court of Kentucky decided this question in the case of *Turner v. Morgan*, 165 S. W. 684, and followed the same rule. The second syllabus reads as follows:

"2. Adverse Possession — Boundary Line — Mistaken Location. Where defendant claimed land in controversy to a mistaken division line, and constructed what he claimed was a line fence, claiming that his deed covered all the land up to the fence, and did not recognize any possible right of another to any part of the land so inclosed, his holding was adverse."

In the case *Edwards v. Fleming, et al.*, 112 Pac. 836, the Supreme Court of Kansas in an early case was very definite in its decision and follows the law set forth in the case cited above, and this Kansas case is directly in point with the case here, and the fifth and seventh syllabus reads as follows:

"5. Adverse Possession—Establishment—Effect of Statutory Survey. Where it appears that the plaintiff has acquired title by deed, adverse possession, and acquiescence in the boundary by the defendants, a survey afterwards made at the request of the defendants, under the provisions of section 2275, Gen. St. 1909, fixing a different boundary to the tract claimed by the plaintiff, furnishes no defense to an action to quiet plaintiff's title."

"7. Adverse Possession—Boundaries—Mutual Agreement of Parties. Adjoining landowners may, either by writing or by parole, agree upon

the boundary between their lands, and their possession on either side up to the boundary so agreed upon will be mutually adverse.”

The Supreme Court of Arkansas, in 1911, passed directly on this question in the case of *St. Louis Southwestern Ry. Co. v. Mulkey*, 139 S. W. page 643. The sixth syllabus reads as follows:

“6. Adverse Possession—Tacking Possession. Though the land described in a deed did not include a strip claimed adversely by the grantee, if the grantors, who had held it adversely, thought it did, and in fact transferred possession of such strip, there was such privity as to entitle the grantee to tack her adverse possession to that of her grantors.”

This case is a similar case to the Ringstad case from the point of facts. Fairbanks was a small town, settled principally by a group of miners who built their homes and lived among themselves, respecting each other's rights, and the evidence in this case shows that R. M. Crawford obtained his deed from the trustee, George A. Parks, conveying Lot 3, in Block 95, in compliance with an act of Congress approved March 3, 1891.

It is quite clear from the evidence, that Mr. Crawford either constructed the old house on this property or purchased it from some one who had built it about 35 years prior to the dispute arising over the boundary line, which took place in May, 1945. The trustee's deed is found at page 70 of the T. R.

Mr. Crawford deeded it to Henry Kortlitzky in August, 1923. (See deed, T. R. p. 72.) The evidence

shows that Mr. Kortlitzky lived in the old house on the property until he died. Then the administrator of the Kortlitzky estate sold this property to the plaintiff, Sylvia Ringstad, on the 17th day of April, 1933. (See administrator's deed, T. R. p. 81.)

The evidence shows, that the old fence dividing Lots 2 and 3 had stood there, on what the owners believed to be the line between the two properties, for 30 years, and was still standing there during the time that Mrs. Ringstad and her children resided on the property. The undisputed evidence is, that a large pole for a radio aerial was standing for years in the southeast corner of the lot; that the fence became rotten and some of the posts fell over, and the wire was down on the ground in the early spring of 1945, when the defendants claimed to have purchased the property next door, and then the trouble commenced. As the record stands, the plaintiff and her predecessors, had possession of the land in question here, and claimed by her, for at least 30 years prior to the dispute that arose over the boundary line, in May, 1945. (See Mrs. Ringstad's testimony commencing on page 83 of the T. R.)

Appellant contends that the trial Court should have sustained her motion for an instructed verdict, ejecting the defendants and restoring her to the possession of the triangular strip of land involved in the dispute as is shown by the plat. (T. R. p. 164.) We request of this honorable Court to render the judgment, that should have been rendered in this case, and stop the long and expensive legal proceedings that has been endured since 1945; which necessitated



two appeals to this honorable Court, and call your attention especially to the judgment rendered by the trial judge in the case (T. R. p. 156), in which he ignored the verdict of the jury and rendered a judgment; which granted the plaintiff the ground under the old house, but took away from her the entire south end of the lot, leaving her with no entrance to the back of her house, taking away her driveway and sewer line that had been there for many years, and used by her and her tenants, when the trial judge should have sustained the plaintiff's request for an instructed verdict.

---

## II.

### **THE SECOND POINT RELIED ON FOR REVERSAL IS:**

Error of the Court in refusing to give plaintiff's offered instruction numbered 1, which is as follows:

"You are further instructed that continuous prior possession is a sufficient estate to warrant a suit in ejectment against an intruder and in this behalf you are instructed that the Statute of Alaska, and especially Section 4313 of the Compiled Laws of Alaska, 1933, provides:

'The uninterrupted, adverse, notorious possession of real property under color and claim of title for seven years or more shall be conclusively presumed to give title thereto, except against the United States,' and, in this behalf, if you find from a fair preponderance of the evidence that the plaintiff has been in the open, notorious and adverse possession of the property in question here for seven years prior to the claimed trespass



then her title would be complete, and your judgment should be for plaintiff."

This being founded upon Section 4313-C.L.A., and the former decision of the Court in this same case, 159 Fed. (2d) 289; also *Campbell v. Silver Bow Basin Mining Co.*, 49 Fed. 47; *Wilson v. Fine*, 38 Fed. 789, 792, and many other cases in point.

The instruction offered literally followed the law of the case as established by this honorable Court in this same case decided on January 31, 1947, and now found in 159 Fed. (2d) at page 289. From page 290 I quote:

"Continuous prior possession is a sufficient estate to warrant a suit in ejectment against a mere intruder. *Campbell v. Silver Bow Basin Mining Co.*, 9 Cir. (1892) 49 F. 47; *Wilson v. Fine*, D. C., 38 F. 789, 792."

Unquestionably, if this instruction had been given, the verdict of the jury would have been for the plaintiff, because there was not the slightest evidence, suggestion or inference to be drawn from the evidence that there was ever a dispute over the correctness of the line of the Ringstad property up until the defendants moved on the property adjoining after the 18th day of May, 1945; this date being fixed by the testimony, and by the defendant's deed itself, which is defendant's Exhibit "3", and is found at page 171 of the T. R.

This instruction was prepared and offered by the plaintiff and refused by the Court, and it is appellant's contention this action was error.

The statute above mentioned, Section 3761-C.L.A. 1933, was taken from Oregon and is identical with Section 5-102, Oregon Code, 1930, down to the words, "Such action shall be commenced", etc., and so far as it affects this case is exactly the same, and the Supreme Court of Oregon in the case of *Feehely v. Rogers*, 80 Pac. (2d) 717, recently said, quoting from the body of the opinion on page 719:

"In this state the rule has become fixed that possession is a sufficient interest in land to enable one ousted therefrom to eject a trespasser or one unable to show a better title. *Gallaher v. Kelliher*, 58 Or. 577, 114 P. 943, 115 P. 596; *Browning v. Lewis*, 39 Or. 11, 64 P. 304; *Sommer v. Compton*, 52 Or. 173, 96 P. 124 (1065); *Oregon Ry. & Nav. Co. v. Hertzberg*, 26 Or. 216, 37 Pac. 1019."

The statute relied upon by plaintiff in requesting this instruction, was Section 4313 C.L.A., 1933, and is identical with Section 1874 C.L.A. 1913, and is also identical with Section 1042, Carter's Annotated Alaska Code of 1900. Therefore, the section relied upon for the instruction offered was in full force and effect at all times from the earliest settlement of the property involved herein.

It is to be noted, that this section specifically applies to Title by Adverse Possession; it contains these words, "under color and claim of title". There is no dispute about the plaintiff claiming title for more than twelve years continuously, and immediately prior to the date the defendants moved next door east; which was in the spring of 1945, and the deed, under which they claim to have taken title, was dated May 18, 1945. (T. R. p. 171.)

Appellant contends that she had complied with both parts of this statute; had color of title and claim of title. Her deed was dated April 12, 1933, and she testified, and no one ever disputed it, that she moved in right away, and no one ever disputed the boundary line until 1945, in May or June. This deed was color of title, and in support of this statement I wish to cite the following cases directly in point:

*Hesser v. Siepmann, et al.*, 76 Pac. 295. The Supreme Court of Washington held:

“4. Where, at the time deeds to a city lot were given to plaintiff and her husband, it was understood that a strip excepted by the deed from the lot was a portion of the lot which was occupied by a street, and that the lot which was purchased reached to the line of the street or avenue, and there was no intention to purchase a lot with such a strip intervening between the boundary of the lot purchased and the street, the deed to the lot as actually conveyed was sufficient to constitute color of title to the strip.”

In the old case of *City of Seattle, Schlossmacher v. Beacon Place Co.*, 100 Pac. 1013, the Court held:

“4. Adverse Possession—‘Color of Title.’ A possession of land by a grantee in a deed of land under the belief that he is the actual possessor of the land conveyed, and he intends to so hold, is a holding under color of title.”

I quote from the body of the opinion on page 1015, as follows:

“It is, however, urged by appellant that the Nelsons did not hold under ‘color of title and claim of right.’ Their possession under the Allen



deed, the construction and intent placed upon that deed as to the property thereby conveyed, their possession under the belief that they were actually in possession of the property conveyed, and their intention to so hold would be a holding under a color of title. In the case of *Flint v. Long*, 12 Wash. 342, 41 Pac. 49, this court, in speaking of 'color of title' in this connection says: 'All that is necessary to be shown is that there was a proof of colorable title under which the entry or claim has been made in good faith.'

\* \* \*

*Flint, et al. v. Long, et al.*, 41 Pac. 49, is a very old case, but well considered, and the first syllabus reads:

"1. One who purchases land under a deed of certain lots as platted obtains color of title to lots staked off as such lots, though in fact they are not the lots called for by the plat."

It is very apparent that in the wording of the Alaska statute, above referred to, that it was the legislative intent to use the two words as synonymous, they are connected by the conjunction, "and". The Supreme Court of Montana very recently in the case of *Sullivan v. Neel, et al.*, 73 Pac. (2d) 206, definitely construed them to be synonymous terms, and in the Alaska statute they are so used in connection, that it is evident that they were used so as to mean the same thing.

The Supreme Court of Montana in passing on this question in the case of *Fitschen Bros. Commercial Co. et al. v. Noyes' Estate*, 246 Pac. 773, quoting from the body of the opinion on page 779 held:



“By the words ‘claim of title’ used in the statute, it is apparent that color of title is meant. And color of title is that which is title in appearance, but not in reality. As a basis of claim by adverse possession, color of title may be shown by any instrument purporting to convey the land or the right to its possession, provided claim is made thereunder in good faith.”

Beyond the purview of all doubt, the original owner of the land here involved thought that he was fencing the property that belonged to him. Please note the plat, 164 of the T. R., and see how the old house was built on the lot, straight with the lines of the fence, also note the pencil line on the plat representing the sewer running from the back of the house to the street, and expecially note the back line running from the northeast corner of the ground to the southwest corner contended for by the defendants, it passes directly through the old house each of the deeds referred to as covering this lot must have intended to convey the fenced land with the old house on it. Mrs. Ringstad testified that it was sold to her as it was fenced, and she bought it that way. She occupied it that way for more than twelve years. Therefore, the deed was color, and claim of title as set forth in Section 4313 C.L.A., as color of title is a writing upon its face, professing to pass title, but which does not do so, and that is exactly what the various deeds to the land above referred to actually did. Each thought he was conveying the exact property fenced and each person believed they were buying that particular property; and in good faith went into possession

thereof and held adversely for many years, and the continuity of title gives Mrs. Ringstad the right to rely on the continuous possession of her predecessors coupled with that of her own to the extent of over thirty years.

Therefore, the Court erred in not giving the instruction, or in giving the substance of it in another instruction, if there was any particular part of the instruction objectionable. It was sufficient to call it to his attention, and his action in the matter was error.

---

### III.

#### THE THIRD POINT RELIED ON FOR REVERSAL IS:

“Error of the Court in giving instruction Number IV, which instruction is as follows:

### IV.

a. For the Plaintiff, Sylvia Ringstad, to be entitled to a verdict herein, she must prove by a preponderance of the evidence in this case each of the following matters, to-wit:

(1) That she and/or her tenants have had possession of said land in controversy herein for ten years;

(2) That such possession was at all times under a claim by her of title to said land in herself, and hostile and adverse to the title of anyone else;

(3) That such possession was at all times actual;

(4) That such possession was at all times open;

(5) That such possession was at all times notorious;

(6) That such possession was at all times continuous for said ten-year period;

(7) That such possession was at all times uninterrupted for a period of ten years;

(8) That such possession was at all times exclusive;

(9) That such possession was at all times visible to anyone in the immediate vicinity of said land.

If the Plaintiff, Sylvia Ringstad, proves each of the above-mentioned matters by a preponderance of the evidence in this case, you should find that she had title to and was the owner of said land in controversy.

If any one of the above-mentioned matters is not proved by a preponderance of the evidence in this case, you should find that the plaintiff, Sylvia Ringstad, is not the owner of said land in controversy herein, and you should bring in a verdict for the defendants.

You are instructed that it is not necessary that said land in controversy herein should have been possessed by the plaintiff as a separate piece of land, but it would be sufficient possession thereof if it, together with lands adjoining it in Lot 3, were enclosed in one tract as shown by the red lines upon plaintiff's Exhibit 'C' and plaintiff's possession of the entire tract would be possession of the land in controversy herein." (Exception allowed plaintiff.)



Section 4313 C.L.A., 1933, does not require or use the words open, continuous, exclusive or visible, and the wording of the instruction placed an extra burden on the plaintiff that was not justified under the Alaska Laws.

---

#### IV.

##### THE FOURTH POINT RELIED ON FOR REVERSAL IS:

“Error of the Court in giving subdivision ‘h’ of instruction V, which is as follows:

h. If you do not find that plaintiff Sylvia Ringstad, is the owner of said land in controversy by adverse possession thereof, you should consider whether or not she is the owner of the part of said land in controversy which is covered by a part of the house of plaintiff. The same elements would have to be proved as to such land covered by said house as was stated hereinabove to be necessary to prove title in plaintiff by adverse possession of the whole of said land in controversy. If you find against the plaintiff as to the whole of said land in controversy herein, and find in favor of plaintiff as to the part of said land in controversy covered by said house, you should sign Verdict Number II.”

“Error of the Court in giving subdivisions 1, 2 and 3 Instruction No. VI, and sub-division 2 of Instruction VI.

(c) In order for plaintiff to be entitled to more than nominal damages for any tearing down of said first mentioned fence, she, Sylvia Ringstad, must prove by a preponderance of the evi-



dence in the case, each of the following matters, to-wit:

(1) That in May, 1945, she had a fence standing upon the land in controversy herein, which fence defendants then tore down;

(2) That said fence was of a *specified value in dollars and cents* in its standing condition just before it was torn down;

(3) That by reason of the tearing down of said fence, the plaintiff *suffered a definite specified damage in dollars and cents.*

\* \* \* \* \*

(e)

\* \* \* \* \*

(2) That the defendants *then and there destroyed said materials*; (Italics mine.)

For the reason this does not state the law correctly and places an extra burden on the plaintiff, and was very prejudicial to the plaintiff."

---

## V.

### THE FIFTH POINT RELIED ON FOR REVERSAL IS:

Appellant will group the Sixth and Seventh points relied upon for reversal together for argument as follows, to-wit:

"Error of the Court in answering a request for additional instructions by calling the Jury in at 8:30 o'clock P.M., August 25, 1947, without the knowledge of plaintiff's attorney and without his being present and gave them the following instruction:

“District Court, Terr. of Alaska 4 Div.  
Ringstad v. Grannis, et al., No. 5357.

Filed in the District Court Territory of  
Alaska, 4th Div., August 26, 1947 /s/ John  
B. Hall, Clerk.

#### INSTRUCTION

“The Jury is instructed that,

Open as used in the Court’s instructions means—  
not covered or concealed.

Exclusive possession in plaintiff means possession  
by plaintiff which is not shared with anyone  
claiming adversely to plaintiff but by plaintiff  
and those she has given permission to be there.

Harry E. Pratt,  
District Judge.”

He was so informed, he objected, and an ex-  
ception was allowed to plaintiff.

#### VII.

Error of the Court committed as follows:

“At 12:15 o’clock A.M., August 26, 1947, the  
Jury reported that it was unable to agree upon  
a verdict, but might do so if additional instruc-  
tions were given. The Court instructed the jury  
to retire and put in writing its request for in-  
structions, thereafter the jury presented the fol-  
lowing request:

“A. That such possession was at all times vis-  
ible to anyone in the immediate vicinity of said  
land.”

“Visible? Does the corner markings with an  
imaginary line running straight between corners  
or must it be a visible fence?”

The Court then gave the following instruction:  
 “In the District Court for the Territory of  
 Alaska,

4th Div.

Ringstad v. Grannis, et al.

#### INSTRUCTIONS

“The Jury is instructed

Visible possession of a piece of ground exists only where there is some marking which may be seen that defines the limits of the possession. Corner markings with merely an imaginary line running straight between corners would not suffice to limit and define a possession of the land in controversy herein so as to make it a visible possession.

Harry E. Pratt,  
 District Judge.”

(T. R. pp. 144-145.)

“To the giving of such instruction, the plaintiff objected and excepted for the reason it improperly stated the law and was prejudicial to the plaintiff, and was allowed an exception by the Court.”

“After this instruction was given the jury soon returned the verdict for the defendants and was an incorrect instruction which caused the Jury to return a verdict in favor of the defendants.”

(T. R. p. 212.)

Appellant claims this was reversal error, and resulted in a very quick judgment for the defendants, and the instruction did not properly state the law

for two reasons. One that it was based upon a condition arising after May of 1945, at a time when the defendants had trespassed upon the plaintiff's ground and dispossessed her thereof; and secondly, it was gross error, especially where the jury had asked a question as follows:

“Visible? Does the corner markings with an imaginary line running straight between corners or must it be a *visible fence*?” (Italics mine.) (T. R. pp. 144-145.)

And, in answer to this question the instruction included by inference that there must be this “visible fence” as set out in the question.

Please note the wording of the question asked by the Jury along with the instruction given by the Court. This instruction given at the time, and under the circumstances amounted to, and was no less than an instruction to render judgment for the defendants, because all of the evidence was to the effect that the old fence was down on the ground when the trouble arose.

Appellant's contention is that it is not necessary at all to completely enclose a town lot to establish adverse possession, for if this was the rule ninety-nine out of every one hundred town properties would not be protected by the law of adverse possession.

In support of this contention, I call your attention to *Goodrich v. Mortimer*, 186 Pac. 844. The third syllabus reads as follows:

“3. Adverse possession—Inclosure not necessary in case of entry under color of title.



To constitute actual possession, inclosure of town lot by a fence or other structure was not necessary; the entry being under color of title supplied by a tax deed supported by insufficient notice and affidavit."

Without a question of a doubt the plaintiff had established title by prescription by having adverse possession from 1933 to 1945 of the triangular strip of land involved here. The limitation of actions statute affecting the recovery of real property is: 3354-CLA, 1933, and the part of this statute affecting this action is as follows:

"Sec. 3354. Within ten years. The periods prescribed in section 3353 for the commencement of actions shall be as follows:

"Within ten years actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it shall appear that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the premises in question within ten years before the commencement of the action." (836-CLA.)

A similar statute with a four year period has been construed by the Supreme Court of Georgia in 1931, in the case of *Woodcliff Gin Co. et al. v. Kittles, et al.*, the second syllabus by the Court reads as follows:

"2. The judge did not err in directing a verdict in favor of the plaintiffs upon the ground that they had acquired title by prescription to the certificates of stock involved in this case."

And, the very long opinion is quite enlightening on the subject, and in this case at the close of the evi-

dence the Court instructed the jury to return a verdict for the plaintiff on the theory that the plaintiffs had had possession of the stock for a longer time than was required by the statute of limitation, and the Georgia Supreme Court upheld the trial Court in instructing the verdict for the plaintiffs.

---

## VI.

### THE SIXTH POINT RELIED ON FOR REVERSAL IS:

“Error of the Court in overruling plaintiff’s motion for a new trial as shown in the transcript, which motion is hereby made a part of this statement of points by reference as fully as if set out herein in full.”

“This above statement or points will be covered by Appellant’s brief, and are relied upon for reversal.”

The Sixth and last point relied upon for reversal, last above set forth, is set out herein to call the Court’s attention to the facts that all of the matters covered by this brief were called to the trial Court’s attention in the motion for a new trial. This point will be submitted on the authorities and statutes set forth above.

---

### CONCLUSION.

In conclusion, permit me to suggest that this Honorable Court render the judgment that should have been rendered in the trial Court. In my humble opinion there is, and could be, no legitimate defense to the

plaintiff's right to recover the property taken away from her by force. The defendants did not plead title in themselves as required by law, and were not entitled to make any proof thereof, and the only proof thereof, if any there was, was made over the objections of the plaintiff. The trial Court should have sustained the plaintiff's motion for an instructed verdict as is shown in the transcript of record at page 121, since the undisputed evidence established the fact that the plaintiff had actual, open, notorious, hostile, adverse, continuous, visible, exclusive and uninterrupted possession of the property for a period of twelve years before the defendants ever stirred up the fuss, and the fact that they did take it away from her by force in the Spring of 1945 could not possibly give them any right to hold it. Her title had become absolute long before the defendants ever purchased the property next door, and had the survey made.

Please permit appellant to humbly request this Honorable Court to render the judgment that should have been rendered in the Court below, and stop this expensive litigation.

Dated, Fairbanks, Alaska,  
June 9, 1948.

Respectfully submitted,

BAILEY E. BELL,

*Attorney for Appellant.*

No. 11877

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

VAN CAMP SEA FOOD COMPANY, INC., a corporation,

Appellant,

vs.

ANTHONY DiLEVA, IVAN JURJEV, MARIE DiLEVA, MIKE DiLEVA, SALVATORE DiLEVA, JACK OLSEN, MARINO TRANSATTI, ANGELO CASTAGNOLA, CHIGI ROMOLIO, SALVATORE CARNAVALE, MATTEO VOLOGNA, PASQUALE GUGLIELMO and PIETRO COLOMBO,

Appellees.

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## APOSTLES ON APPEAL

Upon Appeal From the District Court of the United States  
for the Southern District of California  
Central Division

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FILED

JUN 2 - 1946

PAUL P. O'BRIEN,  
CLERK





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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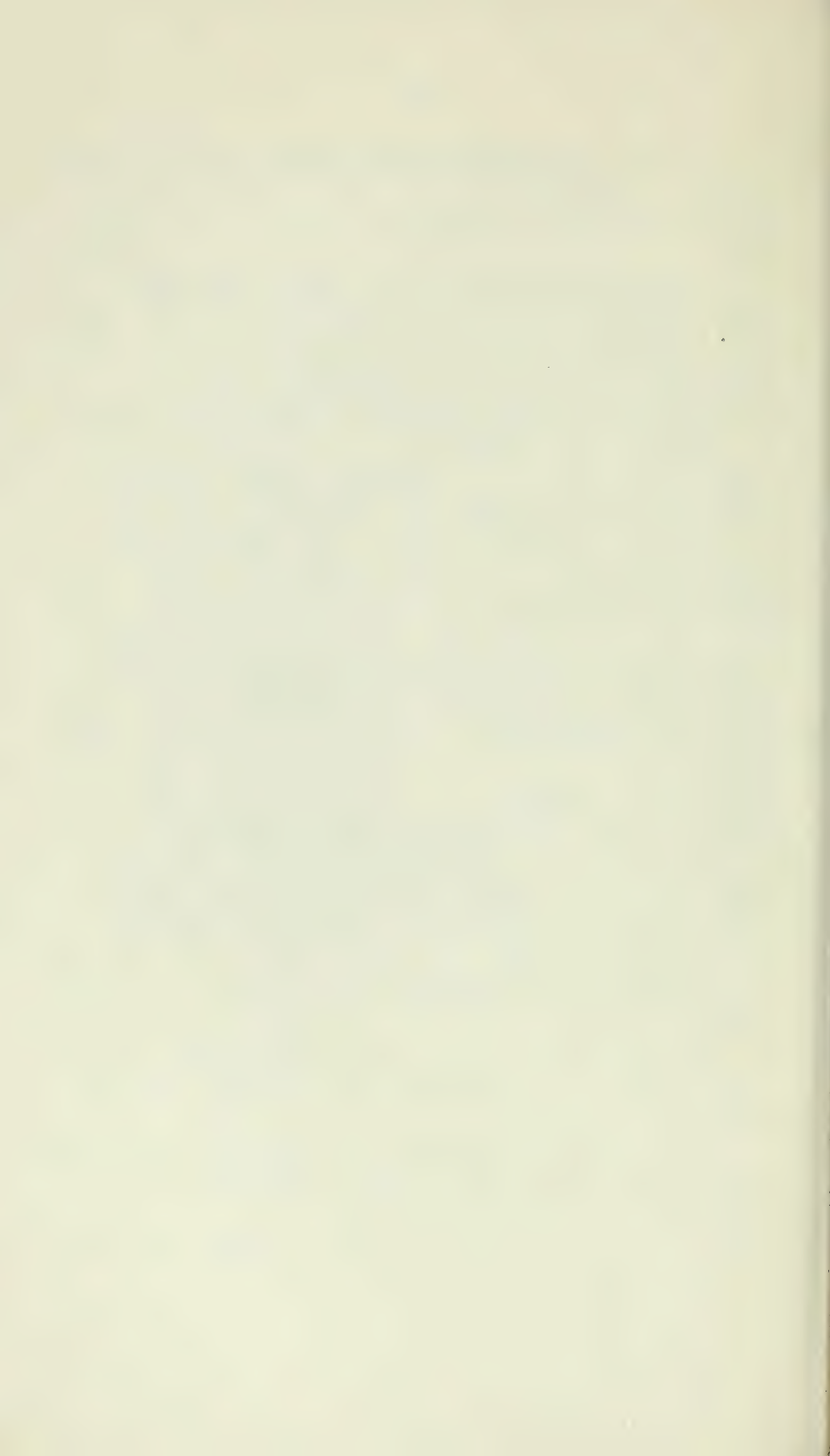
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In the United States Circuit Court of Appeals  
for the Ninth Circuit

SALVATORE DiLEVA, et al.,

Appellees,

vs.

VAN CAMP SEA FOOD COMPANY, INC.,

Appellant.

CITATION

UNITED STATES OF AMERICA, ss.

To Anthony DiLeva, Ivan Jurjev, Marie DiLeva, Mike DiLeva, Salvatore DiLeva, Jack Olsen, Marino Transatti, Angelo Castagnola, Chigi Romolio, Salvatore Carnavale, Matteo Bologna, Pasquale Guglielmo and Pietro Colombo: Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 9th day of March, A. D. 1948, pursuant to an order allowing appeal filed on January 29, 1948, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause No. 4630 B. H., Central Division, wherein Van Camp Sea Food Company, Inc. is appellant and you are appellees to show cause, if any there be, why the decree, order or judgment in the said appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Paul J. McCormick, United States District Judge for the Southern District of California, this 29th day of January, A. D. 1948, and of the

Independence of the United States, the one hundred and seventy-second, Judge Peirson M. Hall being absent and without this District.

PAUL J. McCORMICK

U. S. District Judge for the Southern District of  
California

Service of a copy of the foregoing Citation is acknowledged this 29 day of January, 1948.

HERBERT R. LANDE

Attorney for Appellee

[Endorsed]: Filed Jan. 29, 1948. Edmund L. Smith,  
Clerk. [2]

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In the United States District Court  
Southern District of California  
Central Division

In Admiralty No. 4630-B. H.

ANTHONY DiLEVA, et al.,

Libelants,

vs.

VAN CAMP SEA FOOD COMPANY, INC., a corporation,

Respondent.

SECOND AMENDED LIBEL IN PERSONAM FOR  
DAMAGES DUE TO COLLISION

To the Honorable, the Judges of the United States District Court, Central Division, Southern District of California:

Come now the libelants Anthony DiLeva, Ivan Jurjev, Marie DiLeva, Mike DiLeva, Salvatore DiLeva, Jack

Olsen, Marino Transatti, Angelo Castagnola, Chigi Romolio, Salvatore Carnevale, Matteo Bologna, Pasquale Guglielmo, Pietro Colombo, and for a cause of action in admiralty in personam, Civil Maritime, allege as follows:

### I.

That the libelants are fishermen and seamen and, at the time of the collision alleged hereafter, were members of the crew of the American fishing vessel called the Bessemer; that at said time, the respondent was the owner of said vessel and that Anthony DiLeva was operating said vessel by authority of being [34] appointed master thereof by the respondent.

### II.

That prior to and at the time of the collision alleged hereafter, said vessel was in commercial fishing for sardines in waters off the California Coast; that libelants were serving on said vessel under a share agreement, whereby the value of the fish caught, after deducting fuel and groceries, was divided into 18.75 shares, and of that total, each crewman received one share, and the captain one-half share in addition; that all of the libelants were crewmen receiving one share, except Anthony DiLeva, who was master of the vessel, and he received a share and one-half for compensation as master.

### III.

That the respondent was at the time of the collision alleged hereafter, also the owner and operator, having full management, direction and control, of the American fishing vessel called the "Gloria R."; that the master of said

vessel was the employee and agent of the respondent; that the crew of the said vessel were employees of the respondent and were acting within the scope and course of their employment.

#### IV.

That on or about October 4, 1944, at or about 9:15 P. M., the "Bessemer" was engaged in fishing operations off Catalina Island; that the "Bessemer" was proceeding with all running lights burning; that at said time the "Bessemer" was approximately two to three miles off the East end of Avalon, Catalina Island; that at said time, the vessel was ready to make a set with the net; that the vessel's skiff was in the water, manned and the end of the net was in the skiff; that at said time the vessel was in a large school of fish (sardines); that at said time the vessel was moving ahead slowly to lower the net, headed towards the East end of the Island with the Island approximately dead ahead; that the "Bessemer" thereupon circled to the right in a clockwise direction; that the "Gloria R." [35] at that time was approaching from the north headed towards the east end of Catalina, proceeding in a southwesterly direction and traveling at a speed of approximately seven or eight knots per hour; that the "Gloria R." crossed the bow of the "Bessemer" at a time when the "Bessemer" had practically completed a circle so that it was again headed in an almost westerly direction; that the "Gloria R." thereupon turned left and circled counter-clockwise at full speed of seven or eight knots; that the "Gloria R." continued to circle counter-



clockwise in such a manner that the path of the "Gloria R." again crossed the path of the "Bessemer" so that at a time prior to the collision the red running light of the "Gloria R." was visible about two points off the bow of the "Bessemer"; that thereupon the "Gloria R." continued to turn to the left towards and in front of the "Bessemer" and showed her green light to the "Bessemer"; that then the "Bessemer" sounded her whistle and reversed engines, then the "Gloria R." swung hard left and crossed directly in front of the "Bessemer's" path and while so crossing in front of the "Bessemer", the "Gloria R." crashed with her starboard side into the "Bessemer".

That the master and crew navigating the "Gloria R." were guilty of careless and negligent acts in that:

(1) They handled, operated and navigated the "Gloria R." so that said vessel swung to left across the bow of the "Bessemer" and continued swinging to left until collision occurred.

(2) They failed to keep an adequate lookout.

(3) They were running the "Gloria R." at an excessive speed.

That each and every of the aforesaid acts of negligence were direct and proximate causes of the collision alleged aforesaid.

## V.

That as a proximate result of said negligence of the master and crew of the "Gloria R.", the "Bessemer" was laid up for repairs from October 4, 1944 to on or about October 13, 1944, and during [36] said time the vessel

and its crew lost eight fishing days; that the loss of earnings proximately caused by the said lay up was \$500.00 for each libelant except the master, whose loss was \$750.00; that libelants have demanded payment of said damage from respondent, and respondent has failed and refused to pay same or any part thereof.

VI.

That all and singular the premises are true and within the maritime and admiralty jurisdiction of this Court.

VII.

That the respondent does business in and has officers who reside in the Southern District of California, Central Division.

Wherefore, libelants pray that process in due form of law according to the course and practice of admiralty issue against respondent, citing it to appear and answer all and singular the allegations aforesaid; and that this Court be pleased to decree to libelants payment of the loss aforesaid in the sum of Six Thousand Seven Hundred Fifty Dollars (\$6,750.00) plus costs of suit herein; and for such other and further relief as to the Court seems just.

HERBERT R. LANDE

Proctor for Libelants [37]

[Verified.]

[Endorsed]: Filed Feb. 26, 1946. Edmund L. Smith, Clerk. [38]

[Title of District Court and Cause]

EXCEPTIONS TO SECOND AMENDED LIBEL

Comes now Van Camp Sea Food Company, Inc., respondent herein, and excepts to the second amended libel filed herein as follows:

I.

Excepts to the sufficiency of said second amended libel, and the whole thereof, on the ground that the facts averred in said second amended libel are insufficient to constitute a cause of action.

Wherefore, Respondent Prays that its exceptions be sustained without leave to amend, and that said second amended libel may be dismissed.

McCUTCHEN, THOMAS, MATTHEW,  
GRIFFITHS & GREENE

HAROLD A. BLACK

GEORGE E. TONER

Proctors for Respondent [39]

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[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 14, 1946. Edmund L. Smith,  
Clerk. [40]

[Title of District Court and Cause]

ANSWER OF RESPONDENT TO SECOND  
AMENDED LIBEL

To the Honorable, the Judges of the United States District Court, Southern District of California, Central Division:

The answer of Van Camp Sea Food Company, Inc., to the second amended libel in personam of the libelants, herein sometimes referred to as "said libel", denies, admits and alleges as follows:

I.

Respondent admits the allegations of Article I of said libel.

II.

Respondent admits the allegations of Article II of said libel with respect to the share agreement and in this connection [41] alleges that, as a result of said agreement, libelants became the employees of the respondent, and their wages were contingent upon and dependent upon the profitable operation of said fishing vessel Bessemer; said employment was for no specific period of time, and libelants were free to quit respondent's employ, and respondent was free to discharge libelants, or any or all of them, at any time. Respondent further alleges that, as owner of the said fishing vessel Bessemer, it solely was entitled to the profits, if any, from the operation of said fishing vessel Bessemer, and that, if any profits were made during a period of time said libelants remained in respond-



ent's employ, respondent was thereafter obligated to account to libelants for their shares of said profits in accordance with the share agreement.

### III.

Respondent admits the allegations of Article III of said libel.

### IV.

Answering unto the allegations of Article IV of said libel, respondent alleges that the said allegations are in a large part untrue and falsely alleged and respondent therefore denies each and all of the allegations therein contained except insofar as they may be hereinafter admitted to be true, and upon information and belief alleges the circumstances of the said collision to be as follows:

The Gloria R was engaged in fishing operations on October 4, 1944, in the vicinity of Catalina Island; at about 9:15 p. m. of said date, about four miles north of the easterly end of said Catalina Island, while searching for fish, she was proceeding in a generally northerly direction, at a cruising speed, with all [42] running lights burning; that the Bessemer was proceeding in a generally easterly direction bearing off the port bow of the Gloria R; that the Bessemer crossed the course of the Gloria R and cleared the Gloria R, but immediately thereafter turned hard to starboard so that the Bessemer's course curved toward the south and back toward the west until the Bessemer was headed in approximately a southwesterly direction, and directly toward the starboard side of the Gloria R; that when the Bessemer continued to turn toward the Gloria R, a collision became imminent, and the Gloria R was turned hard to port in an effort to avoid the impending collision, but the stem of the Bessemer

struck and collided with the starboard side of the Gloria R aft of amidships. Further answering the allegations of said Article IV, respondent denies that the master and crew of the Gloria R, or any of them, were guilty of careless and negligent acts, or careless acts or negligent acts as alleged, or in any respect; denies that they or any of them handled or operated or navigated the Gloria R so that said vessel swung to the left across the bow of the Bessemer and continued swinging to left until collision occurred as alleged, but respondent admits that the Gloria R was turned hard to port in an effort to avoid the collision which was then and there impending because of the alteration of the course of the Bessemer; respondent denies that the master or crew of the Gloria R, or any of them, failed to keep an adequate lookout; respondent denies that the master or crew, or any of them, were running the Gloria R at an excessive rate of speed; respondent denies that the master and crew, or master or crew, of the Gloria R, or any of them, were negligent in any respect whatsoever and in this respect alleges that the said collision was due solely to negligence and fault of the Bessemer, her master and crew, libelants in this action, in [43] the following respects, as respondent is informed and verily believes:

- 1) The officers and crew of said Bessemer were not properly stationed and were not attending to their duties;
- 2) The said Bessemer and her navigators failed to observe the Gloria R and failed to avoid running into her;
- 3) The said Bessemer failed to exhibit lights as prescribed by Article 9 of the International Rules for the Prevention of Collisions;

- 4) The said Bessemer, after having crossed the course of the Gloria R from port to starboard, negligently failed to maintain her course but put her rudder hard right, and turned sharply toward and into the said Gloria R;
- 5) The said master and crew of the Bessemer were negligent and failed to exercise due care and prudence to avoid colliding with the Gloria R under the special circumstances then and there existing; and
- 6) The said Bessemer failed to keep out of the way of the said Gloria R, as required by Article 19 of the International Rules for the Prevention of Collisions, but on the contrary, crossed ahead of said Gloria R and turned back into her.

Respondent denies that any acts of the master and crew, or master or crew, of the Gloria R, or any of them, were negligent as alleged in said libel or otherwise, or were the direct and proximate, or direct or proximate cause or causes of said collision, or contributed in any way thereto, and respondent alleges on the contrary [44] that the said collision was due solely, directly and proximately to negligence and carelessness of the said Bessemer and her master and crew, libelants in this action as aforesaid.

## V.

Answering the allegations contained in Article V of said libel, respondent admits that the Bessemer was laid up for repairs from October 4, 1944, to on or about October 13, 1944, a period of eight fishing days, as a result of said collision, but denies that said layup of said Bessemer was a proximate result of negligence of the master and crew, or master or crew, of said Gloria R,



or any of them. Respondent alleges that said Bessemer sustained damage to the extent of \$1,829.48, and that said damage and said layup of said Bessemer was due solely, directly and proximately to negligence and fault of the said Bessemer and of libelants, her master and crew.

Respondent alleges that there were no profits made from the operation of the said fishing vessel Bessemer during the periods mentioned in said libel and, therefore, denies that each of the libelants, excepting the master, suffered a loss of earnings of approximately \$500, or any other amount, and denies that the master has suffered a loss in the amount of \$750, or any other amount; respondent alleges that if libelants, or any of them, did not engage in fishing operations during said period of eight days, said circumstance was due solely and proximately to their own fault and neglect; respondent alleges further that said libelants were free and able to obtain other employment during said period and that if any loss of earnings was sustained by them, said loss was voluntarily sustained and is not a loss for which respondent is liable. Respondent admits that libelants have demanded payment of the respondent for the amounts set forth in said libel and that respondent [45] has declined payment thereof, for the reason that no sum or sums as alleged or in any amount were or are due libelants under said share agreement or otherwise by reason of said operations of the said Bessemer.

## VI.

Respondent denies that any of the premises of the said libel are true, except as herein specifically admitted, but admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court.



## VII.

Respondent admits the allegations of Article VII of said libel.

Further Answering said second amended libel, respondent alleges that the facts averred in said libel are insufficient to constitute a cause of action.

Wherefore, respondent prays that the amended libel and this suit be dismissed hence with costs to the respondent, and that the respondent have such other and further relief as shall be deemed just and proper in the premises.

McCUTCHEN, THOMAS, MATTHEW,  
GRIFFITHS & GREENE  
HAROLD A. BLACK  
GEORGE E. TONER

Proctors for Respondent [46]

[Verified.]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 14, 1946. Edmund L. Smith,  
Clerk. [47]

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[Title of District Court and Cause]

## MEMORANDUM

Upon reading the briefs and after consideration of the evidence, I am of the opinion that the Gloria R was at fault and that by reason thereof the fishermen of the Bessemer suffered a loss. This loss or damage in my opinion should not be figured on a basis of what they might have earned as claimed by libelants but as figured in The Page, Fed. Case No. 10660, page 977.

The legal questions involved, in view of the evidence, have me in a state of confusion. The pleadings allege the relationship of employer and employee and the answer admits such allegations, yet, the charter party agreement (Libelants' Ex. 3) convinces me to the contrary. While the charter party agreement had expired, I believe by the conduct and acquiescence of the parties it continued in effect at the time of the collision. If I am correct in this respect the fishermen were not employees of the respondent.

It has been intimated that the Gloria R was being operated under a similar agreement. If such is true the charterers of the Gloria R would be the proper respondents.

I am inclined to the view, that in the absence of more formidable authorities I should follow *U. S. v. Laflin et al.*, 24 Fed. (2d) 683. It seems that this obstacle created by this authority could be eliminated by the filing of an amended libel. Whether or not the master or any of [48] the fishermen could recover in view of Libelants' Ex. 3 will have to be left open for future argument.

Under the circumstances, I shall allow libelants to file an amended libel within ten days and the respondent a similar length of time to file its reply.

In the absence of any amended pleadings I shall proceed to dispose of the case.

Dated: this 8th day of August, 1946.

BEN HARRISON

Judge

[Endorsed]: Filed Aug. 8, 1946. Edmund L. Smith, Clerk. [49]

In the United States District Court  
Southern District of California  
Central Division

In Admiralty No 4630-B H.

SALVATORE DiLEVA,

Libellant,

vs.

VAN CAMP SEA FOOD COMPANY, INC., a corporation,  
and GENNARO DeLEVA,

Respondents.

#### FIFTH AMENDED LIBEL

To the Honorable Ben Harrison, Judge of the United States District Court, Southern District of California:

The libel of Salvatore DiLeva against Van Camp Sea Food Company, Inc., a corporation, and Gennaro DeLeva, in a cause of action in personam, civil and maritime, respectfully alleges:

#### I.

That at the time of the collision hereafter alleged, the respondent Van Camp Sea Food Company was the owner of the oil screw "Bessemer", a fishing vessel; that the libellant was in possession of said vessel under an oral agreement with the respondent whereby the libellant was given possession of the vessel for the sardine season then in progress, the libellant placed his sardine net on the vessel for the season, the libellant engaged the crew and had the power to discharge any one, the libellant nominated the master and he was appointed by the respondent, the activities and [75] conduct of crew and

master were subject to control of the libelant, the compensation of the respondent was two and three-quarter shares out of a total of eighteen and three-quarter shares of the proceeds of the fish caught, the fish caught must be delivered to the respondent, who paid each crew man one share of the value thereof based on Twenty-two dollars (\$22.00) per ton for sardines; that the libelant, crew members and master were carried on the books of account of the respondent as its employees and deductions from their wages were made by respondent for social security taxes and withholding taxes; that the compensation to libelant for the use of his net on said vessel was two and one-half shares.

## II.

That pursuant to the agreement aforesaid, the libelant engaged the following persons as members of the crew of said vessel, and at the time of said collision, they were in the service of said vessel: Ivan Jurjev, Marie DiLeva, Mike DiLeva, Jack Olsen, Marino Transatti, Angelo Castagnola, Chigi Romolino, Salvatore Carnevale, Matteo Bologna, Pasquale Guglielmo, and Pietro Colombo; that libelant nominated and respondent Van Camp Sea Food Company appointed Anthony DiLeva as master of said vessel, and he was acting as such.

## III.

That for the purposes of this suit, libelant sues for himself and on behalf of each and every of the aforesaid members of the crew of the "Bessemer".

## IV.

That prior to and at the time of the collision alleged hereafter, the libelant, pursuant to his said agreement with the respondent Van Camp Sea Food Company, had



taken said vessel to sea and engaged in fishing operations for sardines in waters off the Southern California Coast.

## V.

[76]

That at the time of the collision alleged hereafter, the respondent Van Camp Sea Food Company was the owner of the oil screw fishing vessel called the "Gloria R."; that said respondent either employed the respondent Gennaro DeLeva to operate the vessel for it, or gave a demise or bare-boat charter to him; that the facts of said transaction are known to respondents and not known to libellant; that the respondent Van Camp Sea Food Company and Gennaro DeLeva or the respondent Van Camp Sea Food Company or the respondent Gennaro DeLeva employed a master and crew thereon; and that at all times mentioned herein, said master and crew were acting within the scope and course of their employment.

## VI.

That on or about October 4, 1944, at or about 9:15 P. M., the "Bessemer" was engaged in fishing operations off Catalina Island; that the "Bessemer" was proceeding with all running lights burning; that at said time the "Bessemer" was approximately two to three miles off the East end of Avalon, Catalina Island; that at said time, the vessel was ready to make a set with the net; that the vessel's skiff was in the water, manned and the end of the net was in the skiff; that at said time the vessel was in a large school of fish (sardines); that at said time the vessel was moving ahead slowly to lower the net, headed towards the East end of the Island with the Island approximately dead ahead; that the "Bessemer" thereupon circled to the right in a clockwise direction; that the "Gloria R." at that time was approaching from the north

headed towards the east end of Catalina, proceeding in a southwesterly direction and traveling at a speed of approximately seven or eight knots per hour; that the "Gloria R." crossed the bow of the "Bessemer" at a time when the "Bessemer" had practically completed a circle so that it was again headed in an almost westerly direction; that the "Gloria R." thereupon turned left and circled counter-clockwise at full speed of seven or eight knots; that the "Gloria R." continued to circle [77] counter-clockwise in such a manner that the path of the "Gloria R." again crossed the path of the "Bessemer" so that at a time prior to the collision the red running light of the "Gloria R." was visible about two points off the bow of the "Bessemer"; that thereupon the "Gloria R." continued to turn to the left towards and in front of the "Bessemer" sounded her whistle and reversed engines, then the "Gloria R." swung hard left and crossed directly in front of the "Bessemer's" path and while so crossing in front of the "Bessemer", the "Gloria R." crashed with her starboard side into the "Bessemer".

That the master and crew navigating the "Gloria R." were guilty of careless and negligent acts in that:

(1) They handled, operated and navigated the "Gloria R." so that said vessel swung to left across the bow of the "Bessemer" and continued swinging to left until collision occurred.

(2) They failed to keep an adequate lookout.

(3) They were running the "Gloria R." at an excessive speed.

That each and every of the aforesaid acts of negligence were direct and proximate causes of the collision alleged aforesaid.

## VII.

That as a proximate result of said negligence of the master and crew of the "Gloria R.", the "Bessemer" was laid up for repairs from October 4, 1944 to on or about October 13, 1944, and during said time the vessel and its crew lost eight fishing days; that the loss of earnings proximately caused by said layup was as follows: \$500.00 loss of earnings sustained by the libelant, and \$1,250.00 loss of use of his sardine net; \$5,500.00 loss of earnings sustained by the crew; and \$750.00 loss of earnings sustained by the master.

## VIII.

That all and singular the premises are true and within the maritime and admiralty jurisdiction of this Court. [78]

## IX.

That respondent Van Camp Sea Food Company, Inc. does business in and has officers who reside in the Southern District of California, Central Division; that Gennaro DeLeva resides in the Southern District of California, Central Division.

Wherefore, libelant prays that process in due form of law according to the course and practice of admiralty issue against the respondents, citing them to appear and answer the allegations aforesaid; that the Court be pleased to decree to the libelant, on behalf of himself and the members of the crew of the "Bessemer", and against whomsoever of the respondents as the Court finds liable to the libelant, payment of the loss aforesaid in the sum of \$500.00 for loss of earnings of libelant, plus \$1,250.00

for loss of use of his sardine net; \$5,500.00 loss of earnings sustained by the crew; and \$750.00 loss of earnings sustained by the master; for costs of suit; and for such other relief as to the Court seems just.

HERBERT R. LANDE  
Proctor for Libelant

[Verified.]

[Endorsed]: Filed Mar. 7, 1947. Edmund L. Smith,  
Clerk. [79]

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[Title of District Court and Cause]

EXCEPTIONS TO FIFTH AMENDED LIBEL

Comes now Van Camp Sea Food Company, Inc., a corporation, respondent above-named, and excepts to the Fifth Amended Libel, (sometimes referred to herein as "said libel") filed herein, as follows:

Excepts to the sufficiency of said libel and the whole thereof on the ground that the facts averred in said libel are insufficient to constitute a cause of action against this respondent.

Wherefore this respondent prays that its exceptions be sustained and that the said Fifth Amended Libel be dismissed as to this respondent.

MCCUTCHEN, THOMAS, MATTHEW,  
GRIFFITHS & GREENE  
HAROLD A. BLACK  
GEORGE E. TONER

Proctors for Respondent, Van Camp Sea  
Food Company, Inc. [80]



MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF EXCEPTIONS

Libelant's sixth effort to state a cause of action has resulted in a pleading which again encounters the difficulties interposed by the 9th Circuit Court of Appeals in the case of

U. S. vs. Laflin (The Lydia) (C. C. A. 1928), 24  
F. 2d 683, 1928 A. M. C. 700

which, as this court has pointed out, effectively precludes recovery by employees from their employer for detention damage. In Article I of the libel, libelant, in order to comply with the court's ruling that the pleading be full and complete, has set forth facts, the legal effect of which establishes the relationship of employer and employee between this respondent and the libelant himself and the crew of the Bessemer. We refer the court to the 9th Circuit Court of Appeals case of

Loe vs. Goldstein (C. C. A. 9th, 1939), 101 F.  
2d 967, 1937 A. M. C. 627

and the case of

Cromwell vs. Slaney (C. C. A. 1st, 1933), 65 F.  
2d 940, 1933 A. M. C. 1514.

In these two cases it is clearly established that the employer-employee relationship in a fisherman's lay agreement depends on whether or not the entire command and possession and consequent control over the vessel has been surrendered to the alleged charterer. The 1st Circuit Court of Appeals found in the latter case that the fisherman was an employee, not of the owner but of the Master, because entire operation of the vessel, in purchasing supplies for the voyage, determining where and

how long the vessel would fish, disposing of the catch, and settling of the bills, was under the sole control of the Master and the owner had no control whatsoever [81] over any operation. The 9th Circuit Court of Appeals in the Loe case rejected the theory urged here by libelant that the "fish boss" was charterer and owner pro haec vice. The court stated that retention by the general owner of any control over the vessel was incompatible with the existence of special ownership in the "charterer". Loe was in the same position with reference to the fish boat Norland as libelant is here with reference to the Bessemer. The court, in a rather complete opinion, indicates that Loe in acting as "fish boss" became an employee of the owner and in hiring the crew acted as agent of the owner. The court said that these crew-members were therefore employees of the owners, indirectly hired and fired by the owners through the agency of the Master; that in such case the owner would be liable for the negligent acts of their crew-member employees.

In the Fifth Amended Libel which, for the purposes of these exceptions must be taken to be true, we find the allegation that libelant nominated the Master who was "appointed" by the respondent. This is clearly an allegation that the owner retained control over the vessel because the Master was the owner's employee. At line 4, page 2, of Article I, appears the allegation, "The fish caught must be delivered to the respondent." This requirement makes the instant case even stronger than that before the 9th Circuit Court in *Loe vs. Goldstein* because there the owner had "nothing to do with its (the crew's) hiring, nothing to do with the fish after they are caught or (nothing to) say (as to) what price they should be

sold for or where they should be sold or anything else.” Article I continues with the allegation that respondent paid each crew man one share of the value of the catch based on \$22.00 per ton. There is no election or freedom from [82] choice on the part of this crew to take the fish where they please. They must deliver them to this respondent, their employer.

A further allegation appears in lines 7 to 10 of page 2, Article I, that libelant, the crew-members and the Master, were “carried on the books of account of the respondent as its employees and deductions from their wages were made by respondent for Social Security taxes and Withholding taxes.” This is squarely in line with the case of

O’Hara Vessels, Inc. v. Hasset (D. C. Mass.  
(1942), 60 Fed. Supp. 672, 1945 A. M. C. 1108

which holds that fishermen on shares are employees. It is to be noted that the 9th Circuit Court of Appeals in the case of

Reskusich v. City of Avalon (C. C. A. 9th, 1946),  
156 F. 2d 500, 1946 A. M. C. 1009

indicates that its attitude with reference to fishermen on shares is similar to that of the Massachusetts court on this question. Our Circuit Court of Appeals pointed out that fishermen’s shares are wages and that the Social Security tax and Withholding taxes were to be deducted by their employer because the fishermen’s share was a “fixed obligation of the employer though undetermined in amount.”

## II.

Article II of the libel, in the light of the case of

Loe vs. Goldstein, *supra*

alleges that the crew-members and the Master were em-

ployees of respondent, Van Camp Sea Food Company, Inc.

### III.

Article III of the libel is defective in view of

U. S. vs. Laffin (The Lydia), *supra* [83]

and the cases cited therein, which holds that the owners are the sole persons entitled to sue for the recovery of the proceeds of a voyage on a shares agreement. The crew-members, who are employees of Van Camp Sea Food Company, Inc., under the holding of the

Loe vs. Goldstein, *supra*

case, cannot improve their situation by suing in the name of this libelant, who under the same case is also an employee of this respondent.

### IV.

Article IV is defective if either of the alternative allegations as to ownership is accepted. The libel alleges that (1) either the Gloria R was operated by Gennaro DeLeva as an employee of the Van Camp Sea Food Company, Inc., or (2) that she was operated by him as a charterer. Being contradictories these allegations cannot both be true, so we have to assume their correctness in the alternative.

In the first event, Van Camp Sea Food Company, Inc., is entitled to a dismissal by reason of the holding in

U. S. vs. Laffin, *supra*

because an employee cannot sue his employer under these circumstances.

There is no cause of action stated here nor can libelant state a cause of action for himself or the crew when



he pleads the details of this employment agreement with this respondent.

If the alternative allegation is accepted and it is assumed that Gennaro DeLeva is a "charterer", the crew of the Gloria R are employees of Gennaro DeLeva. The doctrine of respondeat superior does not apply and no cause of action is stated against Van Camp Sea Food Company, Inc. This respondent would thus be entitled to a dismissal because under this assumption these crew- [84] members are not alleged to be employees of the Van Camp Sea Food Company, Inc.

The objection that libelant does not have a cause of action for himself or for the crew (under *The Lydia Case*) is, of course, equally applicable to the alternative assumption.

## V.

This Court has had presented to it, in the six libels in this case, in one form or another, all the possibilities of this case. Libelant's reluctance to take a position, and his subsequent changing of position is due to the fact that basically no cause of action exists. We appreciate that the Court has been liberal in allowing libelant ample latitude to plead. Certainly no objection can be made to this exercise of the Court's discretion.

If, however, libelant cannot state a cause of action, the Court is entitled to sustain these exceptions without leave to amend. And as to this respondent, libelant is unable to state a cause of action because of the dilemma presented: Either the fishermen on shares are employees of the boat owner in which event the case of *The Lydia*

(U. S. v. Laflin) precludes recovery; or they are employees of a bareboat charterer in which case the doctrine of respondeat superior, upon which libelant relies, is not applicable. In either event no cause of action against respondent, Van Camp Sea Food Company, Inc., can be presented.

We therefore urge the Court to exercise its discretion and make the final disposition referred to in

2 Benedict on Admiralty (6th Ed.), p. 472

“In respect of such (exceptions) as are sustained, the court either makes a final disposition, subject to the defeated party’s eventual right of appeal after a decree, or else orders the libelant to plead anew [85] or the respondent or claimant to answer further within such time and on such terms as the court may direct.”

This Court can and should sustain these exceptions without leave to amend.

Respectfully submitted,

McCUTCHEN, THOMAS, MATTHEW,  
GRIFFITHS & GREENE

HAROLD A. BLACK

GEORGE E. TONER

Proctors for Respondent, Van Camp Sea  
Food Company, Inc.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 10, 1947. Edmund L. Smith,  
Clerk. [86]

[Title of District Court and Cause]

# ANSWER TO FIFTH AMENDED LIBEL

To the Honorable the Judges of the United States District Court, Southern District of California, Central Division:

The Answer of Van Camp Sea Food Company, Inc., and Gennaro DeLeva, respondents herein, to the Fifth Amended Libel in personam of the libelant, (herein sometimes referred to as "said libel"), denies, admits and alleges as follows:

## I.

Answering the allegations of Article I of said libel, respondents admits that at the time of the collision hereinafter alleged, respondent, Van Camp Sea Food Company, Inc., was the owner of the oil screw Bessemer, a fishing vessel; deny that libelant was in possession of said vessel in any capacity other than that of an employee of respondent, Van Camp Sea Food Company; admit that libelant engaged a crew but allege that, in so engaging a crew, libelant acted as the employee [90] or "fish boss" of respondent, Van Camp Sea Food Company, Inc.; admit that libelant nominated the master and that the said master was appointed by respondent and allege that said master thereupon became the employee of respondent, Van Camp Sea Food Company, Inc.; admit that the activities and conduct of the crew and master were subject to control of the libelant but allege that the right to said control of the crew and master remained in respondent, Van Camp Sea Food Company, Inc., and was at all times exercised by said respondent, Van Camp Sea Food Company, Inc., by and through libelant who at all times was

and remained its employee; allege that libelant was hired for the purpose of exercising such control; respondents admit that respondent, Van Camp Sea Food Company, Inc., retained two and three-fourths shares of the net proceeds of the catch of said vessel as its share and that the compensation of the employees of respondent, Van Camp Sea Food Company, Inc., for their services aboard said vessel were a total of sixteen shares of the said net value of the catch; respondents admit that the obligation of the employees of respondent, Van Camp Sea Food Company, Inc., aboard said fishing vessel Bessemer was to deliver all fish to respondent, Van Camp Sea Food Company, Inc., and to no other person, and that at the time mentioned in said libel, the value per ton of sardines was \$22.00. Respondents admit that libelant, crew members and master of said vessel were carried on the books of account of respondent, Van Camp Sea Food Company, Inc., as its employees and deductions from their wages were made by said respondent for Social Security taxes, and withholding taxes, for the reason that said libelant, crew members and master were actual and bona fide employees of respondent, Van Camp Sea Food Company, Inc. Respondents admit that libelant, as an employee of respondent, Van Camp Sea Food Company, Inc., was entitled to two and one-half shares for use of a [91] net which respondent, Van Camp Sea Food Company, Inc., is informed and verily believes was the personal property of libelant and is included in the sixteen aforementioned shares; except as herein specifically admitted, respondents deny each and every allegation of said Article.

## II.

Answering the allegations of Article II, of said libel, respondents admit that libelant engaged certain persons



as crew of said vessel and that at the time of the collision said crew members were in the service of said vessel. Respondents admit that the crew members designated in such article are correctly described with the exception of Romolio Chigi, who is described in said Article as "Chigi Romolio" and Pete Barbieri, who was likewise a crew member but who is omitted from the enumeration of said crew members. Respondents allege that said crew members and master and libelant were employees of respondent, Van Camp Sea Food Company, Inc., that they were hired by libelant who had been hired by respondent, Van Camp Sea Food Company, Inc., as "fish boss" to whom was delegated the duty to hire a crew; that libelant acted as agent and employee of respondent, Van Camp Sea Food Company, Inc., in hiring said crew members and master as employees of respondent, Van Camp Sea Food Company, Inc.

### III.

Answering the allegations of Article III, of said libel, respondents admit that libelant purports to sue for himself and on behalf of each and every of the crew of the said fish boat Bessemer, but respondents deny that libelant has any right to sue for himself or on behalf of such crew members or master of said vessel, or that any of the crew members or the master of said vessel have any right whatsoever to bring this action. [92]

### IV.

Answering the allegations of Article IV, of said libel, respondents admit that at the time of the collision alleged in said libel, libelant was operating said vessel pursuant to an agreement with respondent, Van Camp Sea Food Company, Inc., and had taken said vessel to sea and was engaged in fishing operations for sardines in the waters

of the Pacific Ocean off the Southern California Coast; respondents allege, however, that said agreement created the relationship of employer and employee between libelant and respondent, Van Camp Sea Food Company, Inc., and that in so proceeding and engaging in the said fishing operations, libelant did so as such employee of respondent, Van Camp Sea Food Company, Inc., and that the master and crew of said vessel were likewise employees of the Van Camp Sea Food Company, Inc., at all times therein mentioned.

## V.

Answering the allegations of Article V, of said libel, respondents admit that respondent, Van Camp Sea Food Company, Inc., was the owner of the oil screw fishing vessel Gloria R and that respondent had employed Gennaro DeLeva as "fish boss" to operate said vessel, to hire a crew for respondent, Van Camp Sea Food Company, Inc., for said vessel, that the relationship between the respondent, Van Camp Sea Food Company, Inc., the said vessel Gloria R, respondent Gennaro DeLeva, and the crew of said vessel Gloria R, was identical with the relationship of the various parties to the vessel Bessemer and that said relationship was in accordance with the usual custom and practice in the sardine fishing industry. Respondents deny that respondent Gennara DeLeva was a demise or bare-boat charterer or chartered the vessel in any manner whatsoever, but allege that said vessel Gloria R was being operated on shares in the same manner as said vessel Bessemer was being operated, to-wit, that the "fish boss", [93] master and crew were employees of the boat-owner who were paid a percentage of the net proceeds of the voyage as their wages. Respondents admit further that said master and crew of the Gloria R were

acting within the scope and course of their employment as employees of respondent, Van Camp Sea Food Company, Inc. Respondents allege that the allegations as to the employer-employee relationship between the "fish boss", master and crew members of the Gloria R are based upon information, belief and custom in the sardine fishing industry, but that if the Court finds that said circumstances under and by virtue of which said fishing vessels Bessemer and Gloria R were being operated does not create the relationship of master and servant between said crews and the owner of said vessels, said respondents beg leave to amend this libel accordingly in this respect.

## VI.

Answering the allegations of Article VI, of said libel, respondents allege that the said allegations are in a large part untrue and falsely alleged, and respondents therefore deny each and all of the said allegations therein contained, except insofar as they may hereinafter be admitted to be true and upon information and belief respondents allege the circumstances of the said collision to be as follows:

The fishing vessel Gloria R on October 4, 1944, was engaged in fishing operations in the vicinity of the east end of Catalina Island. At about 9:15 P. M., about four miles north of the easterly end of said Island and while said vessel Gloria R was searching for fish, she was proceeding in a generally northerly direction and observed the Bessemer proceeding in a generally easterly direction off the Gloria R's port bow. Said Bessemer at said time had the Gloria R on her starboard hand in a crossing situation, [94] and was in the position of the burdened vessel required to keep out of the way of the Gloria R and said Gloria R had the said Bessemer on her port hand and was the privileged vessel obligated to obtain her



course and speed. Said Bessemer in violation of her duty to keep out of the way of said vessel Gloria R, crossed ahead of said Gloria R, whereupon the said Bessemer altered her course to starboard and made a turn of 180 degrees until she was headed in a generally westerly direction. Said Bessemer then headed toward the starboard side of said Gloria R. The master of said Gloria R when said vessels were in extremis and in danger of collision attempted to avoid said Bessemer by making a turn to port but said Bessemer continued to move forward despite a belated effort to avoid collision by putting her engines fully astern and the bow of said Bessemer collided with the starboard side of said Gloria R aft of amidships. Further answering the allegations of said Article VI, respondents deny that the master and crew of the Gloria R, or any of them, were guilty of careless and negligent or careless acts, as alleged, or in any respect, deny that they handled, operated and navigated the said Gloria R so that said vessel swung to left across the bow of the Bessemer and continued swinging to left until the collision occurred, except insofar as said turn to the left was made in extremis and in an effort to avoid a collision which was impending because of the negligent navigation of the said Bessemer; respondents deny that said master and/or crew of the Gloria R failed to keep an adequate lookout; respondents deny that the master and/or crew of said Gloria R were running the said Gloria R at an excessive speed. Respondents deny that the master and crew and master or crew of the Gloria R, or any of them, were negligent in any respect whatsoever and deny that such alleged negligence was the direct and/or proximate cause [95] or causes of the said collision, but on the contrary allege that such collision was due solely to negligence and



fault of the Bessemer, her master and crew, and libelant, in this connection in the following respects:

- 1) The officers and crew of said Bessemer were not properly stationed and were not attending to their duties;
- 2) The said Bessemer and her navigators failed to observe the Gloria R and failed to avoid running into her;
- 3) The said Bessemer failed to exhibit lights as prescribed by Article 9 of the International Rules for the Prevention of Collisions;
- 4) The said Bessemer, after having crossed the course of the Gloria R from port to starboard, negligently failed to maintain her course but put her rudder hard right, and turned sharply toward and into the said Gloria R;
- 5) The said master and crew of the Bessemer were negligent and failed to exercise due care and prudence to avoid colliding with the Gloria R under the special circumstances then and there existing; and
- 6) The said Bessemer failed to keep out of the way of the said Gloria R, as required by Article 19 of the International Rules for the Prevention of Collisions, but on the contrary, crossed ahead of said Gloria R and turned back into her.

Respondents allege that said negligent acts of the master and crew of the Bessemer were the direct, sole and proximate cause of said collision between said vessels.

## VII.

Answering the allegations of Article VII, of said libel, [96] respondents admit that the said vessel was laid up

for repairs for a period of eight fishing days from October 4, 1944, to October 13, 1944, but deny that said layup during said period was due to negligence of the master and/or crew of the said Gloria R; respondents are without information as to the loss of earnings sustained by libelant, the master and crew of said vessel and do therefore deny that libelant sustained loss in the amount of \$500.00; deny that libelant sustained loss of use of his sardine net in the amount of \$1,250.00; deny that the crew sustained loss of earnings of \$5,500.00 and deny that the master sustained loss of earnings of \$750.00, or that said persons sustained loss or losses in any other amount, and demand strict proof by libelant as to the alleged items of loss or damage, if any.

#### VIII.

Answering the allegations of Article VIII, of said libel, respondents deny that any of the premises of said libel are true except as herein specifically admitted, but admit the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

#### IX.

Answering the allegations of Article IX, of said libel, respondents admit that respondent, Van Camp Sea Food Company, Inc., does business in and has officers who reside in the Southern District of California, and admit that Gennaro DeLeva resides in said District.

#### X.

And further answering said Fifth Amended Libel, respondents allege that the facts averred in said libel are insufficient to constitute a cause of action against these respondents.

Wherefore respondents pray that the said Fifth Amended Libel [97] and this suit be dismissed hence with costs to the respondents, and that respondents have such other and further relief as shall be deemed just and proper in the premises.

McCUTCHEN, THOMAS, MATTHEW,  
GRIFFITHS & GREENE

HAROLD A. BLACK

GEORGE E. TONER

Proctors for Respondents [98]

[Verified.]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Apr. 28, 1947. Edmund L. Smith,  
Clerk. [99]

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[Title of District Court and Cause]

ORDER SHORTENING TIME FOR HEARING OF  
MOTIONS

Good cause appearing, It Is Ordered that the annexed motions be heard on Thursday the 30th day of October, 1947, at 10:00 a. m., or as soon thereafter as counsel can be heard, prior to trial.

It is Further Ordered that the time provided by Local Rule 3(b) be shortened accordingly, and that copy of said motions, copy of notice of motions, respondents' memorandum of points and authorities and copy of this order be served forthwith upon Herbert R. Lande, Proctor for Libellant.

Dated October 28, 1947.

PEIRSON M. HALL

United States District Judge [100]

[Title of District Court and Cause]

### NOTICE OF MOTIONS

To Herbert R. Lande, Proctor for Libelant:

Please Take Notice that on Thursday, the 30th day of October, 1947 at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard, in the courtroom of Honorable Peirson M. Hall, United States District Judge for the Southern District of California at the Federal Building, City of Los Angeles, State of California, the attached motions will be presented.

McCUTCHEN, THOMAS, MATTHEW,  
GRIFFITHS & GREENE  
HAROLD A. BLACK  
GEORGE E. TONER

Proctors for Respondents [101]

[Title of District Court and Cause]

### MOTIONS TO DISMISS

Now Come Van Camp Sea Food Company, Inc., and Gennaro DiLeva, respondents in the above entitled action by their proctors, McCutchen, Thomas, Matthew, Griffiths & Greene, and move this Court as follows:

#### I.

Respondent Van Camp Sea Food Company, Inc. moves to dismiss the libel on the grounds that:

1. There has been a complete trial as to respondent Van Camp Sea Food Company, Inc., both parties having rested; said trial culminated in the memorandum opinion of the trial court that this action had not been commenced against the proper respondents.



2. Respondent Van Camp Sea Food Company, Inc. should not be harassed by being compelled to relitigate. [102]

3. Libelant has had his day in court as to respondent Van Camp Sea Food Company, Inc.

4. The libel, as amended to conform to proof, does not state a cause of action against respondent Van Camp Sea Food Company, Inc.

5. Libelant does not have the capacity to sue either for himself or representing the crew.

6. Instead of conforming to proof, an entirely new issue and an entirely new party is brought into the case, by the Fifth Amended Libel.

7. Respondent Van Camp Sea Food Company, Inc. should not be compelled to incur the expense and inconvenience of an additional trial, because of the fact that the prior action was brought against an improper respondent.

## II.

Respondent Gennaro DeLeva moves to dismiss the libel as to him on the grounds that:

1. He is improperly joined as a respondent in this case.

2. No proper procedural steps were taken to join him as a party respondent.

3. He will be prejudiced by being compelled to come into a case after completion of the trial thereof.

4. If libelant has a cause of action against respondent Gennaro DeLeva, his proper remedy is by commencing a separate action.

5. No cause of action against respondent Gennaro DeLeva is stated in libelant's Fifth Amended Libel.

6. Libelant does not state facts in the Fifth Amended [103] Libel showing that he has capacity to sue for himself or on behalf of the balance of the crew.

III.

Respondents Van Camp Sea Food Company, Inc. and Gennaro DeLeva move that the order of this Court dated September 8, 1947 setting this matter for trial be vacated; said motion is based on the records, files and proceedings in this case.

Dated October 28, 1947.

McCUTCHEN, THOMAS, MATTHEW,  
GRIFFITHS & GREENE  
HAROLD A. BLACK  
GEORGE E. TONER

Proctors for Respondents [104]

\* \* \* \* \*

[Affidavit of Service by Mail.]

[Endorsed]: Filed Oct. 28, 1947. Edmund L. Smith,  
Clerk. [107]

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[Minutes: Thursday, October 30, 1947]

Present: The Honorable Peirson M. Hall, District Judge.

For trial and for hearing on motion to dismiss, pursuant to notice thereof filed Oct. 25, 1947; H. R. Lande, Esq., present for libelant; G. E. Toner, Esq., present for Van Camp Sea Food Co.;

Attorney Toner makes a statement in support of motion to dismiss and Attorney Lande makes a statement in opposition.

The Court states that the memorandum of opinion of Judge Harrison was made during a vacation of the trial which had occurred to that date, and that thereafter a new libel was filed with the amended pleadings and new parties, and that libel is now before the Court for trial de novo.

The Court denies the exceptions and motion to dismiss. Attorney Lande makes opening statement.

Witness DiLeva is called, sworn, and testifies for libelant, and Lbt's Ex. 1 offered and marked for ident.

At 11:20 A. M. court recesses. At 11:30 A. M. court reconvenes herein and all being present as before, Witness DiLeva resumes the stand and testifies further.

Salvatore Carnevale is called, sworn, and testifies for libelant.

Jack Olsen is called, sworn, and testifies for libelant.

At 12:07 P. M. court recesses to 2 P. M. At 2:12 P. M. court reconvenes herein, and on motion of Attorney Lande, Lbt's Ex. 2 and 3 are admitted in evidence. Libelant rests.

On motion of Attorney Toner, it is ordered that this complaint is hereby dismissed as to Defendant Gennaro DiLeva. [108]

Anthony DiLeva is called, sworn, and testifies for respondent Van Camp Sea Food Co., and Respondents' Ex. A is admitted in evidence.

Jacob Pugliese is called, sworn, and testifies for the respondents.

Gennaro DiLeva and Nicola Curci, respectively, are called, sworn, and testify for libelant.

Mike Liddi is sworn and acts as in interpreter of the Italian language.

At 3:12 P. M. court recesses. At 3:25 P. M. court reconvenes herein and all being present as before, Biago Cummo and Fenton K. Gertsle, respectively, are called, and testify for libelant; and Respondent's Ex. B is admitted in evidence, following which counsel stipulate that pages 101 to 108 of the transcript from previous trial may be deemed to have been read into the record and marked Libelant's Ex. 4 and admitted in evidence.

Both sides rest. Attorney Lande waives opening statement. Attorney Toner makes a statement.

The Court finds in favor of the libelant and fixes damages in the sum of \$4,752.00, less operating expenses, unemployment taxes, and withholding taxes, and that counsel for the libelant prepare Findings and Judgment accordingly. [109]

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[Title of District Court and Cause]

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on the 28th day of October, 1947, in the above court, Honorable Peirson Hall, United States District Judge presiding; Herbert R. Lande appearing as proctor for the libelant, and McCutchen, Thomas, Matthew, Griffiths & Greene, by Harold A. Black and George E. Toner, appearing as proctors for the respondents; and evidence oral and documentary having been taken and received, and the cause submitted for decision, the Court makes the following findings of fact and conclusions of law:



## FINDINGS OF FACT

## I.

That it is true that prior to and on the 4th day of October, 1944, the respondent Van Camp Sea Food Company, Inc., a corporation, was the owner of the oil screw "Bessemer", a fishing [110] vessel; that said respondent employed the libelant and a crew of twelve fishermen to operate said vessel in the commercial fisheries; that the master of said vessel was employed and appointed by the said respondent; that of the proceeds of the fish caught by said crew and vessel, after deduction of fuel and dockage, the respondent was entitled to  $3\frac{1}{4}$  shares, less  $\frac{1}{2}$  share given as bonus to master; the owner of the net, libelant Salvatore DiLeva, was entitled to  $2\frac{1}{2}$  shares; and each of the 13 crew members were entitled to one share thereof.

## II.

That it is true that the said respondent Van Camp Sea Food Company, Inc., employed on said vessel "Bessemer" the following crew members, and that at the time of the collision referred to hereafter, said fishermen were in the service of said vessel: Ivan Jurgev, Mario DiLeva, Mike DiLeva, Jack Olsen, Marino Transatti, Angelo Castagnola, Chigi Romolino, Salvatore Carnevale, Matteo Bologna, Pasquale Guglielmo, Pietro Colombo, Salvatore DiLeva and Anthony DiLeva as master; that libelant sues on behalf of himself and each and every of the said crew.

## III.

That it is true that prior to and at the time of the collision referred to hereafter, the master and crew of the "Bessemer" had taken said vessel to sea and were engaged in fishing operations for sardines in waters off the Southern California coast.

## IV.

That it is true that prior to and at the time of the collision referred to hereafter, the respondent Van Camp Sea Food Company, Inc., was the owner of the oil screw fishing vessel called the "Gloria R." and that said respondent employed the master and crew thereof; that said master and crew were, at the time of the collision mentioned hereafter, acting within the scope [111] and course of their said employment.

## V.

That it is true that on or about October 4, 1944, at or about 9:15 P. M., the "Bessemer" was engaged in fishing operations off Catalina Island; that the "Bessemer" was proceeding with all running lights burning; that at said time, the "Bessemer" was approximately two to three miles off the east end of Avalon, Catalina Island; that at said time the vessel was ready to make a set with the net but had not commenced to make the set nor lowered the net to the skiff; that at said time the vessel was in a school of fish (sardines); that prior to the collision, the vessel was moving ahead slowly at a speed of from one to one and one-half knots per hour, headed in a westerly direction and that at said time, the "Gloria R." was headed in an easterly direction and running at a speed of approximately eight knots per hour; that thereupon the "Gloria R." turned sharply to the left and crossed the bow of the "Bessemer"; that while so crossing the bow of the "Bessemer", the right side of the "Gloria R." smashed into the bow of the "Bessemer" and damaged her; that prior to the collision the "Gloria R." did not slacken her speed; that prior to the collision the "Bessemer" threw her engines and propeller into reverse in an endeavor to avoid the collision; that prior to the collision, the

"Bessemer" was observed by the master of the "Gloria R."; that the said collision was directly and proximately caused by the negligence of the master and crew of the "Gloria R." in the operation and navigation of said vessel so that it negligently turned and crossed the bow of the "Bessemer" when in the positions aforesaid.

## VI.

That it is true that as a proximate result of the said negligence of the master and crew of the "Gloria R.", the "Bessemer" was laid up for repairs from October 4, 1944, to [112] October 13, 1944, inclusive; that during said time, the master and crew of the "Bessemer" were unable to fish; that the loss of earnings proximately caused by said layup was the sum of \$239.22 to each of the twelve crew men; the sum of \$363.53 to the master, Anthony DiLeva; and the sum of \$621.65 to the owner of the net on the "Bessemer", Salvatore DiLeva.

## VII.

That it is true that the respondent Van Camp Sea Food Company, Inc., has offices and does business within the Southern District of California, Central Division.

## CONCLUSIONS OF LAW

### I.

That the respondent Van Camp Sea Food Company, Inc., is liable for the negligence of the master and crew of the "Gloria R." and that the said collision with the "Bessemer" was directly and proximately caused by the said negligence of the master and crew of the "Gloria R."

## II.

That the libelant is entitled to recover from the respondent Van Camp Sea Food Company, Inc., the following sums for and on behalf of himself and the following crew members, as damages for loss of earnings:

Ivan Jurgev .....	\$239.22	
Mario DiLeva .....	239.22	
Mike DiLeva .....	239.22	
Jack Olsen.....	239.22	
Marino Transatti.....	239.22	
Angelo Castagnola.....	239.22	
Chigi Romolino .....	239.22	
Salvatore Carnevale .....	239.22	
Matteo Bologna.....	239.22	[113]
Pasquale Guglielmo .....	\$239.22	
Pietro Colombo .....	239.22	
Salvatore DiLeva.....	239.22	
Anthony DiLeva (master).....	363.53	
Salvatore DiLeva (net shares).....	621.65	

## III.

That libelant is entitled to recover his costs herein.

Dated: Dec. 9th, 1947.

PEIRSON M. HALL

United States District Judge [114]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Dec. 9, 1947. Edmund L. Smith,  
Clerk. [115]



In the United States District Court  
Southern District of California

Central Division

In Admiralty No. 4630 P. H.

SALVATORE DiLEVA,

Libelant,

vs.

VAN CAMP SEA FOOD COMPANY, INC., a corporation,  
and GENNARO DeLEVA,

Respondents.

### JUDGMENT

The above entitled cause came on regularly for trial on the 28th day of October, 1947, in the above entitled court, Honorable Peirson Hall, United States District Judge presiding; Herbert R. Lande appearing as proctor for the libelant, and McCutchen, Thomas, Matthew, Griffiths & Greene, by Harold A. Black and George E. Toner, appearing as proctors for the respondent Van Camp Sea Food Company, Inc.; and evidence, oral and documentary having been taken and received, the cause submitted for decision, and written findings of fact and conclusions of law having heretofore been made and filed:

It is therefore Ordered, Adjudged and Decreed that the libelant do have and recover from the respondent Van Camp Sea Food Company, Inc., for and on behalf of the following persons the sums set after their names: [116]

Ivan Jurgev .....	\$239.22
Mario DiLeva .....	239.22
Mike DiLeva .....	239.22
Jack Olsen .....	239.22
Marino Transatti .....	239.22
Angelo Castagnola.....	239.22
Chici Romolino .....	239.22
Salvatore Carnevale.....	239.22
Matteo Bologna.....	239.22
Pasquale Guglielmo.....	239.22
Pietro Colombo .....	239.22
Salvatore DiLeva.....	239.22
Anthony DiLeva (master).....	363.53
Salvatore DiLeva (net shares).....	621.65

It is further Ordered, Adjudged and Decreed that the respondent Van Camp Sea Food Company, Inc., deduct from said crew members recovery, the lawful social security taxes and withholding taxes according to each of said crew members rate of exemption, except the recovery of Salvatore DiLeva for the loss of use of his fish net.

It is further Adjudged that libelant recover his costs in the sum of \$48.80.

Dated: November 9th, 1947.

PEIRSON M. HALL

United States District Judge

Judgment entered Dec. 9, 1947. Docketed Dec. 9, 1947. C. O. Book 47, page 370. Edmund L. Smith, Clerk. [117]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Dec. 9, 1947. Edmund L. Smith, Clerk. [118]

[Title of District Court and Cause]

PETITION FOR APPEAL

To the Honorable Paul J. McCormick, Judge of the  
United States District Court, Southern District of  
California, Central Division:

Van Camp Sea Food Company, Inc., your petitioner, one of the respondents herein hereby prays that it may be permitted to take an appeal from the final decree (designated as "Judgment"), entered herein on the 9th day of December, 1947, and from each and every part of said decree. Said petitioner does further pray that it may be permitted to take an appeal from the order entered herein on the 30th day of October, 1947, on the Civil Docket of said Court and in the minutes of said Court, wherein it was ordered [119] that libellant recover the sum of Four Thousand Seven Hundred Fifty-two Dollars (\$4,752.00) less operating expenses, unemployment taxes and withholding taxes.

Your petitioner also desires that the supersedeas bond filed herewith in this Court be approved by this Court, and that execution of the aforesaid final decree and the aforesaid order be stayed, pending the determination of the appeal herein.

Dated at Los Angeles, California, this ..... day  
of January, 1948.

McCUTCHEN, THOMAS, MATTHEW,  
GRIFFITHS & GREENE  
HAROLD A. BLACK  
GEORGE E. TONER

Proctors for Respondent Van Camp Sea  
Food Company, Inc.

Service of the within Petition for Appeal and receipt of a copy is admitted this 29 day of January, 1948. Herbert R. Lande, Attorney for Libelants.

[Endorsed]: Filed Jan. 29, 1948. Edmund L. Smith, Clerk. [120]

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[Title of District Court and Cause]

### ORDER ALLOWING APPEAL

The petition of Van Camp Sea Food Company, Inc. for an appeal from the final decree entered in the above-entitled cause on the 9th day of December, 1947, and from the order entered in the above-entitled cause on October 30, 1947, in the Civil Docket and in the minutes of said Court, wherein it was ordered that libelants recover the sum of Four Thousand Seven Hundred and Fifty-two Dollars (\$4,752.00) less operating expenses, unemployment taxes and withholding taxes, is hereby granted, and the appeal is allowed.

It Is Further Ordered that a certified copy of the record herein be forthwith transmitted to the United States Circuit Court [121] of Appeals for the Ninth Circuit.

It Is Further Ordered, that the supersedeas bond filed herein be, and the same is hereby approved, and that execution of the aforesaid final decree and of the aforesaid order, be, and is hereby stayed, pending the determination of the appeal herein.

Dated, at Los Angeles, California, this 29th day of January, 1948.

PAUL J. McCORMICK  
United States District Judge

Service of the within Order Allowing Appeal and receipt of a copy is hereby admitted this 29th day of January, 1948. Herbert R. Lande, Attorney for Libelants.

[Endorsed]: Filed Jan. 29, 1948. Edmund L. Smith, Clerk. [122]



[Title of District Court and Cause]

### NOTICE OF APPEAL

Please Take Notice that Van Camp Sea Food Company, Inc., one of the respondents in the above-entitled case, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree entered herein on the 9th day of December, 1947, and from each and every part of said judgment; and from the order entered herein on October 30, 1947, in the Civil Docket of said Court and in the minutes of said Court wherein it was ordered that libelants recover the sum of Four Thousand Seven Hundred and Fifty-two Dollars (\$4,752.00) less operating expenses, unemployment taxes and withholding taxes, plus costs, and from each and every part of said order. [123]

Dated this ..... day of January, 1948.

McCUTCHEN, THOMAS, MATTHEW,  
GRIFFITHS & GREENE  
HAROLD A. BLACK  
GEORGE E. TONER

Proctors for Respondent Van Camp Sea  
Food Company, Inc.

To: Edmund L. Smith, United States District Court:

To: Herbert R. Lande, 413 West Seventh Street, San  
Pedro, California, Proctors for Libelants:

Service of the within Notice of Appeal and receipt of a copy is hereby admitted this 29th day of January, 1948. Herbert R. Lande, Attorney for Libelants.

[Endorsed]: Filed Jan. 29, 1948. Edmund L. Smith,  
Clerk. [124]

[Title of District Court and Cause]

## ASSIGNMENT OF ERROR

### I.

The Court erred in finding that it is true that the Bessemer was proceeding, at the time of the collision referred to herein, with all running lights burning.

### II.

The Court erred in finding that it is true that at the time of the collision the Bessemer was ready to make a set but had not commenced to make the set nor lowered the net to the skiff.

### III.

The Court erred in finding that the Gloria R was negligent [125] or that her master or her crew was negligent in their operation or navigation of said vessel at or prior to the time of said collision between the Bessemer and the Gloria R., in turning and crossing the bow of the Bessemer or in any other respect.

### IV.

The Court erred in finding that the collision between the Bessemer and the Gloria R was directly and proximately or in any other manner caused by negligence of the Gloria R.

### V.

The Court erred in finding that as a proximate result of such alleged negligence, the Bessemer was laid up for repairs.

## VI.

The Court erred in finding that the Bessemer was laid up for repairs for the period from October 4, 1944 to October 13, 1944 inclusive.

## VII.

The Court erred in finding that the loss of earnings, proximately caused by the layup of the Bessemer, was the sum of \$239.22 to each of twelve crew men, the sum of \$363.53 to the master, Anthony DiLeva and the sum of \$621.65 to the owner of the net on the Bessemer, Salvatore DiLeva.

## VIII.

The Court erred in denying respondent Van Camp Sea Food Company, Inc.'s motion to dismiss this action against this respondent.

## IX.

The Court erred in not finding that the libelant's fifth amended libel did not state a cause of action against respondent Van Camp Sea Food Company, Inc.

## X.

The Court erred in not dismissing this action as to respondent Van Camp Sea Food Company, Inc., at the termination of first trial [126] of this cause.

## XI.

The Court erred in permitting a second trial of the same matter as to respondent Van Camp Sea Food Company, Inc., after a complete prior trial upon the same issues.

XII.

The Court erred in proceeding to a second trial upon the identical issues before the Court in the prior trial to allow libelants to join an additional party not before the Court at the time of the first trial.

XIII.

The Court erred in allowing the second trial to proceed without proper order allowing addition of a new party.

XIV.

The Court erred in regarding the memorandum opinion of the District Judge who presided at the first trial, as an order vacating the prior proceedings, when such memorandum opinion purported merely to allow additional proceedings as to the legal effect of an alleged charter party, and a determination of the status of the fishermen aboard both fishing vessels.

XV.

The Court erred in overruling respondent's exceptions to libellant's Fifth Amended Libel.

XVI.

The Court erred in its conclusion of law that respondent Van Camp Sea Food Company, Inc. is liable for negligence of the master and crew of the Gloria R and that the collision between said vessel and the Bessemer was directly and proximately caused by negligence of the master and crew of the Gloria R.

XVII.

The Court erred in its conclusion of law that libellant [127] is entitled to recover from respondent Van Camp Sea Food Company, Inc. the following sums on behalf



of himself and the following crew members as damages and loss of earnings:

Ivan Jurjev	\$239.22
Mario DiLeva	239.22
Mike DiLeva	239.22
Jack Olsen	239.22
Marino Transatti	239.22
Angelo Castagnola	239.22
Chigi Romolio	239.22
Salvatore Carnevale	239.22
Matteo Bologna	239.22
Pasquale Guglielmo	239.22
Pietro Colombo	239.22
Salvatore DiLeva	239.22
Anthony DiLeva (master)	363.53
Salvatore DiLeva (net shares)	621.65

#### XVIII.

The Court erred in its conclusion of law that libelant is entitled to recover his costs.

Dated January 29, 1948.

McCUTCHEN, THOMAS, MATTHEW,  
GRIFFITHS & GREENE  
HAROLD A. BLACK  
GEORGE E. TONER

Proctors for Respondent Van Camp Sea  
Food Company, Inc.

Service of the within Assignment of Error and receipt of a copy is hereby admitted this 29th day of January, 1948. Herbert R. Landt, Attorney for Libelants.

[Endorsed]: Filed Jan. 29, 1948. Edmund L. Smith, Clerk. [128]

In the United States District Court  
Southern District of California  
Central Division

In Admiralty No. 4630 B. H.

ANTHONY DiLEVA, IVAN JURJEV, MARIE DiLEVA, MIKE DiLEVA, SALVATORE DiLEVA, JACK OLSEN, MARINO TRANSATTI, ANGELO CASTAGNOLA, CHIGI ROMOLIO, SALVATORE CARNEVALE, MATTEO BOLOGNA, PASQUALE GUGLIELMO, and PIETRO COLOMBO,

Libelants,

vs.

VAN CAMP SEA FOOD COMPANY, INC., a corporation, and GENNARO DiLEVA,

Respondents.

### SUPERSEDEAS BOND

Know All Men By These Presents that Fireman's Fund Indemnity Company, a corporation organized and existing under and by virtue of the laws of the State of California and authorized to do a surety business in the State of California, is held and firmly bound unto Salvatore DiLeva in the full and just sum of Three Thousand Eight Hundred Fifty-five and 82/100 Dollars (\$3,855.82) to be paid to said Salvatore DiLeva or his duly designated attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves and administrators, successors and assigns, jointly and severally by these presents. [129]

Whereas, lately at a District Court of the United States for the Southern District of California, Central Division,

in a suit pending in said Court between Anthony DiLeva, Ivan Jurjev, Marie DiLeva, Mike DiLeva, Salvatore DiLeva, Jack Olsen, Marino Transatti, Angelo Castagnola, Chigi Romolio, Salvatore Carnevale, Matteo Bologna, Pasquale Guglielmo, and Pietro Colombo, libelants against Van Camp Sea Food Company, Inc., and Gennaro DiLeva as respondents, a decree was entered against said respondent Van Camp Sea Food Company, Inc., and the said respondent having filed in said Court a notice of appeal and a petition for the allowance of an appeal, to reverse the said decree in the aforesaid suit, the aforesaid appeal being directed to the United States Circuit Court of Appeals for the Ninth Circuit.

Now, the Condition of the Above Obligation Is Such that if the said respondent shall prosecute the said appeal to effect and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full any modification of the judgment and such costs, interests and damages that the appeal Court may adjudge and award if said respondent fails to make said plea good, then the above obligation to be void; else to remain in full force and virtue.

Dated this 29th day of January, 1948.

(Seal)

FIREMAN'S FUND INDEMNITY  
COMPANY

By L. H. Schwobeda

Its Attorney in Fact

The premium charged for this bond is \$77.12 per annum.

State of California

County of Los Angeles—ss.

On this 29th day of January, 1948, before me, M. E. Beeth, a Notary Public in and for said County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared L. H. Schwobeda, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Fireman's Fund Indemnity Company and acknowledged to me that he subscribed the name of Fireman's Fund Indemnity Company thereto as principal, and his own as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the said County of Los Angeles the day and year in this certificate first above written.

(Seal)

M. E. BEETH

Notary Public in and for the County of Los Angeles,  
State of California

My commission expires March 24, 1949.

Approved this 29th day of January, 1948. Herbert R. Lande, Proctor for Libelants and Appellees [130]

Recommended for approval as provided in Rule 8. McCutchen, Thomas, Matthew, Griffiths & Greene, Harold A. Black, George E. Toner, Proctors for Respondents and Appellants.

I hereby approve the foregoing bond this 29th day of January, 1948.

PAUL J. McCORMICK

United States District Judge



Service of the within Supersedeas Bond and receipt of a copy is hereby admitted this 29th day of January, 1948. Herbert R. Lande, Attorney for Libelants.

[Endorsed]: Filed Jan. 29, 1948. Edmund L. Smith, Clerk. [131]

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[Title of District Court and Cause]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 142, inclusive, contain the original citation and full, true and correct copies of Libel in Personam for Damages Due to Collision; Respondent's Exceptions to the Libel; First Amended Libel in Personam for Damages Due to Collision; Exceptions to First Amended Libel; Second Amended Libel in Personam for Damages Due to Collision; Exceptions to Second Amended Libel; Answer of Respondent to Second Amended Libel; Memorandum: Third Amended Libel; Exceptions of Respondent Van Camp Sea Food Co., Inc. to Third Amended Libel; Fourth Amended Libel; Stipulation and Order for Dismissal as to Gennaro DiLeva et al.; Exceptions to Fourth Amended Libel; Fifth Amended Libel; Exceptions to Fifth Amended Libel of Van Camp Sea Food Company, Inc., a corporation; Exceptions to Fifth Amended Libel of Van Camp Sea Food Company, Inc. and Gennaro DeLeva; Answer to Fifth Amended Libel; Motions to Dis-

miss, Notice of Motions and Order Shortening Time; Minute Order Entered October 30, 1947; Findings of Fact and Conclusions of Law; Judgment; Petition for Appeal; Order Allowing Appeal; Notice of Appeal; Assignment of Error; Supersedeas Bond; Praecipe for Apostles; Stipulation and Order for Transmission of Original Exhibits and Docket Entries which, together with copy of Reporter's Transcript of Proceedings on May 16, 1946; April 7, 1947; June 30, 1947; September 8, 1947 and October 28 and 30, 1947 and original Libelant's Exhibits 1, 2, 3 and Respondent's Exhibits A, B, C, and D at the hearing on May 16, 1947 and original Libelants' Exhibits 1, 2, 3 and 4 and Respondent's Exhibits A and B at the hearing on October 30, 1947, transmitted herewith, constitute the Apostles on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing Apostles amount to \$16.45 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 5 day of March, A. D. 1948.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy Clerk

[Title of District Court and Cause]

Honorable Peirson M. Hall, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, October 30, 1947

Appearances:

For the Libelant: Herbert L. Lande, Esq., 413 West Seventh Street, San Pedro, California.

For the Respondents: McCutchen, Thomas, Matthew, Griffiths and Greene, 704 Roosevelt Building, Los Angeles 14, California; and Harold A. Black, Esq., and George E. Toner, Esq. [3\*]

Los Angeles, California, October 30, 1947

10:00 o'clock A. M.

The Court: Ex parte?

The Clerk: No ex parte, your Honor.

No. 4630-PH, Civil; Salvatore Di Leva v. Van Camp Sea Food Company, Inc., et al. for trial.

Mr. Lande: Ready for libelant, your Honor.

Mr. Toner: Ready for the respondents.

The Court: Proceed.

Mr. Toner: If the Court please, may we have a ruling on our motions prior to trial?

The Court: Which motions?

Mr. Toner: On the motions to dismiss on the ground, first, that there has been a complete trial here as to the respondent Van Camp Sea Food Company and that it is inequitable to put Van Camp Sea Food Company through another trial of this case. We had the first trial which

\*Page number appearing at top of page of original Reporter's Transcript.

terminated in a memorandum opinion by Judge Harrison who said that he figured that the libelant here had sued the wrong parties.

The Court: I explained your memorandum that you filed yesterday and your motion to dismiss. It appears to be based on identically the same ground as that set forth in the exceptions to the fifth amended libel filed on March 10, 1947, as well as exceptions to the fifth amended libel filed April 28, 1947. [14]

Mr. Toner: In part, yes, if the Court please.

There is also the additional factor that we did not previously urge the fact that the Van Camp Sea Food Company had been through a trial of this matter. The previous exceptions were solely on the merits.

The Court: As to the exceptions covered in your previous exception, I think that I must regard them as the law of the case.

Mr. Toner: I believe that is correct.

The Court: The docket shows that the March 10th exceptions were overruled on April 7, 1947.

Mr. Toner: Those were the exceptions of the Van Camp Sea Food Company, and there has been no ruling—

The Court: And on April 28, 1947 the exceptions were filed on behalf of Van Camp Sea Food Company and Gennaro de Leva to the fifth amended libel, where the same points were raised as in the Van Camp Sea Food exceptions which were overruled on April 4, 1947, and in connection with these exceptions I do not find any record of a hearing except that the docket shows that on June 16, 1947 the case was continued for setting, and it was transferred to be on June 30th.

Therefore the only thing I can do is presume that the exceptions were overruled, otherwise it would not have



been continued for setting. I think that everything you have raised in that exception must also be regarded as the law of [15] the case and settled.

Now you say there is an additional point?

Mr. Toner: Yes, in that if the libelant sues Van Camp Sea Food Company, as they have here, alone and they have gone through a trial—

The Court: There was no judgment.

Mr. Toner: That is correct, there was no judgment, but there is this memorandum opinion.

Now the law of the case, as I see it, may well be taken to follow the memorandum opinion in that the Court said that the alleged charterer may have been the proper defendant

The Court: But the Court did not make that finding. The Court says that it has been intimated that the Gloria R was being operated under a similar agreement. If such is true, the charterers of the Gloria R would be the proper respondents. He does not make any finding to that effect, so I do not believe that the trial could be said to be concluded when it did not eventuate in a judgment. And, as indicated by the memorandum opinion, he is allowing the libelants to file another amended libel.

Mr. Toner: To conform to proof.

The Court: Under the circumstances, I shall allow the libelant to file an amended libel. The Court did not say anything about conforming to proof, because he states here that it is only intimated that something is true. [16]

Mr. Toner: After a trial, if the Court please, I would think it quite irregular and surprising to bring in a new defendant. A sues B and then the Court goes through the trial and A says, well, I should have had C in here.

The Court: Is it your position that any statute of limitations has run against Gennaro de Leva?

Mr. Toner: No.

The Court: Very well, then.

Mr. Toner: At the end of the case you have the defense of laches, but in any event the statutory period has not run in the California statute of limitations at the time this process was served. So that point is not involved.

The Court: If that is the case, then I cannot see why during the trial—and this was during the trial—the Court cannot permit the bringing in of additional parties.

Mr. Toner: I think it was after the trial. Both parties had rested and the case was submitted.

The Court: Is it your position that the trial is still going on and all it needs is a decision on the case as it was rested?

Mr. Toner: Well, frankly, I don't know. This is a rather unusual procedure and, to use the Court's words in another case, I am a little at sea in this admiralty case. But it seems to me very surprising that after the libelants have rested and the case is submitted that the libelants now are [17] able to bring in a new party. Don't they have their recourse against the new party if they have a claim against them, which I think they don't, but don't they have the right to bring in an entirely new action? Don't they have the duty to bring in an entirely new action? The same point came up in the other case.

The Court: That is not what Judge Harrison held.

Mr. Toner: There was no specific holding, your Honor.

The Court: But Judge Harrison said that he would allow them to file an amended complaint, and if it is true

that they are a charterer then they should be proper parties, so they have filed an amended complaint and brought this other party in. Now it may be that the sole issue upon which evidence should be taken—by the way, I understand there is a transcript of the testimony?

Mr. Toner: There is.

The Court: —the sole issue that should be tried at this time is whether or not the Gloria R was a chartered vessel or if they were employees of Van Camp Sea Food Company.

Mr. Toner: That is certainly an issue before the Court, but I don't believe that it is the sole issue.

The Court: What are the other issues?

Mr. Toner: I don't see how Gennaro de Leva can be bound in what happened in a trial against an entirely different defendant. He wasn't a party to the case at the time his previ- [18] ous testimony was taken.

The same identical point was raised in the Southern District of New York in this Connett case, 43 F. Supp. 245, and the Court there said:

“Midway in the trial”—(that evidently is before the parties had rested)—“the libelant moved to bring in Gallagher Bros. Sand & Gravel Co. Inc., as respondent. The motion is denied. Suit against the Gallagher Corporation, as charterer of the libelant's barge, was always open to the libelant. His motion now we regard as untimely and in any event we see no prejudice in its denial.”

Isn't the same argument that was used in that case midway in the trial so much more available to us where the parties here have rested and the case is submitted?



Mr. Lande: May I make a sketch on the board to show the proceedings of this litigation and how the parties happened to come into it?

The Court: I think I know pretty well how that comes out. What I am thinking about is this, that Judge Harrison's opinion in that case, memorandum or whatever you call it, is the law of the case as far as it goes. He said they could file and should file an amended libel. They have filed an amended libel wherein new parties have been brought in, and [19] it looks to be like I have to try the whole case over again.

Mr. Lande: That is my opinion.

If I may say, your Honor, here we started out I think with 13 libelants—that was on the Bessemer—and they sued the Van Camp Sea Food Company.

The first exception came in and we alleged that the Gloria R was a boat owned and operated by the Van Camp Sea Food Company. They said, well, you have to name who it was operated by. All right. So we said it was operated by de Leva.

Then the exception came in, well, di Leva and these 13 libelants all work for Van Camp Sea Food and therefore under their theory of law there could be no recovery.

They also said that the 13 libelants couldn't sue in their own names, that they had to sue in the master's name. So we filed an amended libel there that put the master as the libelant against Van Camp Sea Food and we went to trial on that libel with the master against Van Camp as the respondent.

The Court: Was that the first amended libel?

Mr. Lande: Yes, that is the one we went to trial on, whether it was the first or second one.



The Court: There are six here. This is the fifth amended libel that we are down to. I thought you went to trial on the fourth amended libel.

Mr. Toner: We went to trial on the first amended libel. [20]

The Court: When did these amended libels come in?

Mr. Toner: They came in after the trial of the case, where the libelant was attempting to state a case and conform to proof, and we have had three libels since then in which the libelant has been unable to state a cause of action.

Mr. Lande: Regardless of which libel it was, it went to trial on the case of the master against the Van Camp Sea Food, and during the trial Judge Harrison said, well, it may be that this boat, the Gloria R, was under charter to de Leva instead of an employee. If it was under charter, he said, and Van Camp Sea Food had nothing to do with the boat, they just rented it and had no control over it, it was just a bare boat charter, then the suit should be against the operators of it, the actual operators, the captain of the charterer, of the Gloria R, and that was their contention.

So to give them a day in court on that contention, he said, all right, we will have an amended libel filed and name one or the other or both. And at that time the respondent came in and said, well, as far as Gennaro de Leva is concerned, he has come in for the first time and that issue hasn't been litigated, and when he is in court we have an entirely new trial as to him, and inasmuch as Judge Harrison has tried the case and found against him on the issue of liability we don't think it is proper for him to try it again, or to get a fair trial, so it should be transferred to an- [21] other judge. That is

why we are here. But the issue was then whether or not di Leva was an independent charterer.

Now when they come into your court here they say that di Leva is our employee, switching back to their original position.

Mr. Toner: If the Court please, I want to take exception to that. We have never shifted our position in this case at all. These men have been acknowledged to be employees right straight down the line, as far as we are concerned.

Mr. Lande: All right. We won't go into that point. But anyway, regardless of how we got here, we are now at the position where the respondent says that di Leva was the employee of Van Camp Sea Food and we are suing through our master as our representative, suing Van Camp Sea Food for the torts of its agent. It is just that simple a case. The master, as representative of his crew, sues the Van Camp Sea Food for the tort of its agent de Leva.

Mr. Toner: In the memorandum opinion, if the Court please, Judge Harrison said that he would regard The Lydia (24 F. (2d) 683) as controlling, in which case it was held that the captain and the crew did not have authority to sue.

The Court: I just finished reading that case but I do not know that I read it the same way.

I will deny your exceptions on the ground that the memorandum opinion of Judge Harrison was a vacation of the trial [22] which had occurred to that date; that thereafter a new complaint was filed, with amended pleadings and new parties, and that that complaint is now before the Court for trial de novo.

I will deny the exceptions on the other grounds which you have mentioned and which have heretofore been

covered in the exceptions to the libels which were denied by Judge Harrison.

I hope I have made my ruling clear, whether it is right or wrong.

Mr. Toner: I don't necessarily feel that way about it, your Honor, but I do want a definite ruling.

The Court: Is my ruling clear to you?

Mr. Toner: Yes, I understand it.

The Court: Is it clear to you?

Mr. Lande: Yes, your Honor.

The Court: In other words, we are starting out on the commencement of a trial, all of the proceedings heretofore had are vacated, there is a new complaint before the Court and the exceptions are overruled.

Mr. Toner: May I ask this, are we going to have any further rule of the case arising out of Judge Harrison's memorandum opinion?

The Court: I do not know. I will have to wait and see as the issues present themselves to me. What he has done, in my judgment, is that he just vacated the trial. [23]

Mr. Toner: I believe that is correct.

The Court: I think he vacated the trial and said, well, you start over again, and they started over again with a new complaint and brought in a new party.

Mr. Toner: I think that that is vacated for all purposes so that we don't have to run into the rule of the case any further. If it is a trial de novo it should be entirely de novo.

The Court: This is presently my view, that in vacating the trial and permitting an amended complaint, he vacated all of the rulings which he had made up to that portion. In other words, he said, I will let the party file



an amended complaint and start over again. They have started over again. Now I regard his subsequent rulings on exceptions to libels, to the amended libels filed after that, as binding now upon me as the rule of the case.

Mr. Toner: Yes, I understand.

The Court: Therefore I will overrule your present exceptions which are based on those same grounds.

Mr. Toner: That is correct.

Mr. Lande: If I may interrupt the Court, I think the Court is falling into error, for this reason, that at the time these exceptions were filed to the fifth amended libel we have had no hearing on those, your Honor.

The Court: Yes. [24]

Mr. Lande: No—I beg your pardon—unless I am greatly in error. The exceptions were filed with the answer.

Mr. Toner: Those were the exceptions of Gennaro de Leva. There was a ruling on Van Camp's exceptions.

The Court: That is right. I have them right here.

Mr. Toner: I believe it was on the 7th of June, if I am not mistaken.

The Court: Here is the fifth amended libel. It was filed March 7th. Exceptions to the fifth amended libel were filed on behalf of Van Camp Sea Food Company on March 10th and were overruled April 7th. Further exceptions to the fifth amended libel were filed April 28, 1947 on behalf of Van Camp Sea Food and Gennaro de Leva. The record shows that they were on the calendar on the 16th of June. The minutes do not show any specific action by the Court as to them, except that the Court continued the case for setting. Now the case is not ready for setting until the exceptions have been disposed of. Therefore I must regard the record as show-



ing that these exceptions were overruled by Judge Harrison before the case was subsequently transferred to me on June 30th.

Mr. Toner: They were overruled by implication then.

The Court: No, I have to go further than that. I have to hold that they were overruled because the case would not have been continued for setting if they had not been overruled. [25]

Mr. Toner: Unless error was committed.

The Court: So while your answer was filed at the same time, I must regard the record as reflecting the exceptions filed at that time on behalf of both respondents to have been overruled, and then the case was continued for setting and transferred to be and has been set for trial.

Mr. Toner: In any event, the Court has today overruled these exceptions, so I believe that that is corrected if there was an error.

The Court: As to your exceptions today, you have stated that they contain the same grounds that were heretofore covered in your previous exceptions which, as I have indicated, have been ruled upon by Judge Harrison on two different dates, except the one point that there was a complete trial, and as to that exception I am holding that there was not a complete trial, the the order of Judge Harrison contained in his memorandum opinion filed August 8, 1946 was a vacation of the trial, of the proceedings had in the trial, so that now there is a new trial.

Proceed.

Mr. Lande: Mr. Di Leva, will you take the stand, please?

ANTHONY DI LEVA

called as a witness by and on behalf of the libelant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name? [26]

The Witness: Anthony Di Leva.

The Clerk: Your address?

The Witness: 884, 18th Street, San Pedro.

Mr. Toner: Pardon me, if the Court please. One thing more. As is the usual admiralty case, I assume that the issue of liability is now before the Court and that the issue of damages will be deferred?

The Court: Yes, I think we should probably settle the question of liability.

Mr. Toner: Because I think there is no reason for bothering the Court with an involved trial on the issue of damages where, if such necessity arises, the Court can send the case out for a reference to a commissioner.

Mr. Lande: We would rather have the Court determine it. We think it is a simple matter.

The Court: I do not think we can send it to a commissioner without the consent of both parties.

Mr. Toner: In admiralty you can make an interlocutory decree.

Mr. Lande: At any rate, the issue of damages I don't think will be that complicated. I believe the Court can settle the matter.

The Court: In view of the objection, I think that probably the evidence had better go in on the whole matter.

Let me see, now, you represent both respondents? [27]

Mr. Toner: That is correct.

## (Testimony of Anthony Di Leva)

Mr. Lande: One "Di Leva" is D-i Leva and the other is D-e Leva.

Mr. Toner: That is not correct.

Mr. Lande: Which one is which?

Mr. Toner: In this case, as we had in the previous case, there is going to be some confusion. The gentleman who is on the stand is Anthony Di Leva, master of the Bessemer. He has no middle name.

The gentleman back here is Anthony Di Leva, who was on the Gloria R. He likewise has no middle name.

The Court: Is your name spelled D-i L-e-v-a?

The Witness: That is right.

The Court: And the libelant's name, Salvatore Di Leva, is listed as D-i L-e-v-a.

Mr. Toner: That is this Anthony Di Leva's father.

The Court: And Gennaro is spelled D-e L-e-v-a.

Mr. Toner: D-i.

The Court: And the other Anthony Di Leva?

Mr. Toner: Is likewise D-i L-e-v-a. The two Anthonys are cousins.

The Court: It is pleaded here as D-e L-e-v-a.

Mr. Toner: That is incorrect.

The Court: Do you have any objection to amending it?

Mr. Toner: No. [28]

The Court: On motion of libelant's counsel the pleadings will be amended so as to show the respondent Gennaro D-i L-e-v-a.

Do you have any charts here that you want to have marked for identification in advance?

Mr. Lande: No, your Honor. We will draw our diagrams as we go along.

(Testimony of Anthony Di Leva)

The Court: Very well.

Mr. Lande: Your Honor, may I ask counsel one thing? I think it would be well if counsel stated the position of the respondents, to wit, if Anthony Di Leva and his crew of the Gloria R are employees of Van Camp Sea Food or are they not.

The Court: I thought he had stated that in the answer.

Mr. Toner: I have stated that through six libels, and they are employees and they are not charterers.

The Court: That is the way I read your answer to the fifth libel.

Mr. Toner: Yes, exactly.

The Court: That they are and were at the time employees.

Mr. Toner: Yes.

I should also like, if the Court please, to get some expression of opinion from the libelant as to what his theory of the case is as to whether these men are employees or charterers. We have been trying to pin them down through these six libels and sometimes they are employees and some- [29] times they are charterers.

The Court: I think it might be well for libelant's counsel to make an opening statement with relation to that point. There is no pretrial memorandum filed by libelant's counsel.

Mr. Lande: There were so many memorandums in the case, your Honor, I didn't want to encumber the record any further.

The Court: I know there are a great many, but there have been so many that I cannot take it for granted that



(Testimony of Anthony Di Leva)

any previous memorandum will apply to the present state of the case.

Mr. Lande: Our position is as stated in the libel, that the libelant and the crew of the Bessemer were in possession of this vessel under an oral agreement with the respondent whereby they were given possession of the vessel for the sardine season then in progress.

The Court: Is it your legal position that they were charterers of the vessel or employees of the vessel?

Mr. Lande: We would not like to put them in airtight compartments known as charterers or employees. We would like to present the entire factual picture to you and to deduct from that the legal rights of the parties.

The Court: You must have some idea in your mind in advance about the ultimate position you want the judge to take.

Mr. Lande: Grossly speaking, your Honor, and not wanting [30] to put them in an airtight compartment whereby all the common law incidents of that compartment are taken as the law of the case, but using the expression "grossly" it is our position that they were employees, that they had this boat from the Van Camp Sea Food Company and they were under an obligation to deliver their fish to that cannery, that the master of the vessel was actually appointed by the cannery although nominated by the men on the Bessemer. At the same time they were out there operating on the high seas as an independent unit and when they were smacked into by another independent unit of the Van Camp Sea Food Company that they are entitled to recover damages, and that the common law rule of fellow-servant does not

(Testimony of Anthony Di Leva)

apply because they were two separate enterprises with one joint management and control over the actual navigation of the vessel.

Now there is only one case we have found that has ever been cited, the case of the *Petrel*, an English case, and they have held that the common law rule of fellow-servant does not bar recovery.

Mr. Toner: If the Court please, it might simplify matters if during the recess the Court will look at *Loe v. Goldstein*, which is 101 F. (2d) 967, in which the Ninth Circuit was faced with the problem of an injury by a fisherman on this type of venture and the court—

The Court: On another vessel? [31]

Mr. Toner: No. It was a claim by a fisherman against the owner of the vessel he was working on. The discussion of whether it was a chartered vessel or whether this man was an employee was gone into very thoroughly by the Ninth Circuit in that case.

The Court: Counsel, I understand your position to concede that the right of an employee does not exist to sue his master-servant rule generally.

Mr. Toner: Yes.

The Court: But that where, as in admiralty, you have one common employer and they start out on two separate ventures, as in two separate vessels, and the vessels after they get upon the seas are in complete control of the master of the vessel that a different rule applies.

Mr. Lande: Precisely, your Honor.

Mr. Toner: The fellow-servant rule does not apply in that case. We are making no issue of the fellow-servant rule.

The Court: It does not apply in this case?

(Testimony of Anthony Di Leva)

Mr. Toner: No. That has been well worked out in the past century or so.

The Court: Even though they have these common owners?

Mr. Toner: Yes.

The Court: Very well.

Mr. Toner: The question at issue though in this particular case is the converse of this *Loe v. Goldstein*. In that [32] case the owner, in defense of the personal injury claim, said, no, I am not in charge of this vessel at all, it is in the hands of a charterer, and said that this man is not a charterer, that I am working for the owner.

Now in this particular case we are saying that these men are all employees and up to now the libelant hasn't definitely stated any conclusion as to whether they are employees or charterers.

The Court: He has now stated that they are employees.

Mr. Toner: Very well.

Mr. Lande: Grossly speaking.

Mr. Toner: Now, wait a minute. I don't know what an employee "grossly speaking" is.

The Court: I suppose maybe we will find out, or make an attempt to.

Proceed.

#### Direct Examination

By Mr. Lande:

Q. Mr. Di Leva, at the time of the collision with the *Gloria R.* were you the master of the *Bessemer*?

A. I was.

Q. How many men were in your crew on that night?

A. Thirteen.

(Testimony of Anthony Di Leva)

Q. And what type of operation was your vessel engaged in? [33]

A. Sardine fishing.

Q. When had the season started?

A. October 4th, I think it was; first night out.

Q. That was the beginning of the dark of the moon?

A. Beginning of the dark.

Q. Was this the first night out?

A. Yes, it was.

Q. What year was this?

A. 1944; October 4th.

Q. What type of vessel were you operating?

A. Well, it is called a purse seiner.

Q. I will show you this model—by the way, your Honor, I don't wish this model to be introduced in evidence—is this approximately the type of vessel that you were operating?

A. Yes, it is. We don't use this purse seine. There is two types of nets. Ours is a lomparo, on which we don't use no table, and this is a purse seine where they use a table.

The Court: You just pile yours on the deck?

The Witness: That is right. We didn't have no top house here. (Indicating on model.)

By Mr. Lande:

Q. Now on the night of October 4th were you looking for fish on Catalina Island?

A. Yes, we were. [34]

Q. On the board here I have a piece of paper tacked up, and we will say the top of this paper represents north, this is south, east and west, and this end of the



(Testimony of Anthony Di Leva)

body here is Catalina Island. Were you fishing off of Catalina Island that night?

A. Yes, we were.

Q. Will you step up to the board, please?

This mark I have here represents the east end of Catalina Island. Is that approximately what the land mass there looks like? A. Yes.

The Court: The east end would be the lower end of Catalina Island?

The Witness: Yes.

Mr. Lande: Where Avalon is.

The Witness: This is the east end. You know where Avalon is at? It is on the other end of the island.

By Mr. Lande:

Q. Do you want to draw it?

A. (Drawing on blackboard.) Say this is the east end here; here is Avalon Bay right in here. (Indicating.)

The Court: That is on a smaller scale than counsel drew.

Mr. Lande: The collision took place some miles off the east end of the island, so the exact terrain is not material. [35]

Q. As you came up to that end of Catalina Island, were you looking for fish? A. Yes

Q. Did you find a school of fish?

A. Yes, we did.

Q. Tell the Court what happened after that.

A. We found a school of fish in between, say, the east end of Avalon, about three miles out, I guess, and we found the fish here (indicating), and we were heading out in this position here, and we come up on them and made a couple of circles clockwise on the fish because

the moon was up. I don't know if your Honor is familiar with the procedure of fishing, but when the moon is up they are hard to see, the water don't fire, there is no phosphorus, so you listen to the fish.

The Court: I thought you said you were fishing in the dark of the moon.

The Witness: It was the dark of the moon, but the moon was out already, the moon came up early that night, and when the moon is out you usually look around for an hour or two and you can hear them flipping. In other words, they are breaking water. And the amount of fish flipping, that is how you determine how much fish there usually is, and you take a chance and see how much you get out of it.

In this instance the moon was up already and we could [36] just barely see them but we could hear the fish breaking the water.

So to make sure we made a couple of circles and stopped, and then listened to them again and we would find them over here, the first time, so we made another circle to make sure, to get the biggest amount of them. Then all of a sudden the fish were traveling, they happened to be traveling east, the next time we found them over here (indicating), so we figured we would make a counter-circle counter-clockwise, this way here (indicating).

By Mr. Lande:

Q. You have it going clockwise, to the right.

A. I meant clockwise. We made two counter-clockwise, then the third one we made like this. (Indicating.)

Q. Clockwise to the right?

A. To the right, yes, to get on the fish right away.

The Court: Did you put out your nets?

(Testimony of Anthony Di Leva)

The Witness: No, we didn't. We were all ready to lower the nets, we had the fellows in the skiff, the end of the net tied to the skiff.

By Mr. Lande:

Q. About how fast were you going at that time?

A. We were only going with the propeller about a mile or a mile and a half, that is all, with the clutch in. That is the position we were in when the Gloria R come in front of [37] us and struck us.

Mr. Lande: Your Honor, may I on the diagram draw a rectangle with the bow to represent his boat?

The Court: Why not let him represent it?

Mr. Lande: I am afraid he will draw it out of scale.

Mr. Toner: I would much rather have the witness do it.

The Court: I would not say that that was a scale map you have there.

By Mr. Lande:

Q. Will you draw a little ship-like rectangle to show the Bessemer?

A. I am not an artist—

The Court: Just draw arrows the way you were going first.

The Witness: (Drawing on blackboard) We went twice that way.

The Court: Then you turned around and went clockwise the other way?

The Witness: (Drawing on blackboard)

By Mr. Lande:

Q. During this time, what lights did you have on your vessel?

A. Red and green lights.

(Testimony of Anthony Di Leva)

Q. Will you step up to the model and show the Court where your running lights were? [38]

A. This is the red light, this is the port side; this is the green light, the starboard side.

Q. While you were in this operation of setting over the fish, did you see the Gloria R at any time?

A. Yes, I did. They were north of us.

Q. For the Gloria R use this red crayon, please, and designate on that diagram.

A. (Drawing on blackboard) They were about in this position here.

Q. About how far away from you were they?

A. Oh, they were, I would say, two, three miles away.

Q. Did you see them after you saw them in that position?

A. I seen them all the time. I was listening for the fish and I observed his course. We made a circle, he was heading toward the Island, and while we were circling the fish his course was to the east end all the time, the east end of the Island.

Then as we started to make the clockwise turn he headed out in this direction here.

The Court: Put arrows there.

The Witness: (Drawing on blackboard)

By Mr. Lande:

Q. You have a position marked here. When he was in that position did you observe his lights? [39]

A. Yes, I did. I seen his red light all the time here.

Q. Just a minute. When you say "all the time"—may I mark these positions A, B, C and D, your Honor?

The Court: Very well.



(Testimony of Anthony Di Leva)

By Mr. Lande:

Q. Now in position C and D, which of his lights did you see?

A. I seen the red light.

Q. Did you see his green light?

A. No, I didn't.

Q. What happened after you saw him in position D?

A. When I seen him in position D we were just slowing down, just completing our circle.

Q. Will you put an arrow where you were at that time?

A. (Drawing on blackboard)

The Court: Mark his positions 1, 2, 3 and 4, something like that.

Mr. Lande: All right.

The Court: No. 1 when he started, 2 is where he made the clockwise turn, 3 is down there where he has the boat out.

Mr. Lande: Yes.

The Court: So you were in position 3 when he was at D?

The Witness: That is right.

The Court: All right. [40]

By Mr. Lande:

Q. Now which light on your vessel was to the light of the Gloria R? A. Our red light.

Q. In other words, you were red to red?

A. Red to red; yes.

Q. What does red to red mean?

A. Red to red, that is navigation, when you go red to red or green to green that is to avoid accidents. In other words, I don't know if I can explain it so well—

(Testimony of Anthony Di Leva)

The Court: You mean you should continue going that way?

The Witness: Continue your course until you are clear, red to red, green to green.

The Court: Each vessel is supposed to—

The Witness: Keep their course until they are clear of each other.

By Mr. Lande:

Q. Now will you return to the blackboard. What happened to the Gloria R from the position D?

A. We finished our circle to go on the fish here, and we were just going, as I say, with the propeller, going about a mile, and then all of a sudden—

Q. When you draw the Gloria R, use the red crayon.

A. We were just completing our circle here. All of a sudden—I was looking at them all the time—I seen his [41] red and green. In other words, that showed that he was turning.

The Court: Mark it on that map there. He turned north then?

The Witness: Yes.

The Court: That is position E?

The Witness: E.

Then after, all of a sudden, I seen him turning.

The Court: In the meantime you proceeded in your circle?

The Witness: In the circle. We completed the circle. We were showing our red light and he was showing his red and green.

Then all of a sudden I seen him in this position here. (Indicating) All of a sudden he turned his green lights toward us. Then I hollered at my father to back up

(Testimony of Anthony Di Leva)

because we were going slow ahead, to go full speed reverse as we thought we would clear him. I don't know what happened. All of a sudden he turned, he changed his course to cut across our bow, and he come like this right straight in front of our bow (indicating), and all of a sudden I guess he thought he would clear us by turning to port, and the bow turned to port but the stern clipped our bow like that (indicating), just shoved our bow in.

Mr. Lande: May I mark the point of collision F?

The Court: Yes. [42]

What rate was he going?

The Witness: He was going about 8 knots. He never slowed down. He just kept going, that is all. We hollered at him but it happened so darn fast after he turned full speed that I thought if we backed up full speed that we could—

The Court: You did put your motor in reverse?

The Witness: We were in reverse, but we still had a little forward motion. But still it happened so fast that when he turned over to port the vessel—you know how it moves, this way here—his stern pushed our bow out. He hit us in the bow.

The Court: He turned sharp to port.

The Witness: He turned sharp over and thought he would clear us, I guess, and he hit our bow.

Mr. Lande: Will you resume the stand, please?

Q. What happened after the collision?

A. We stopped and we hollered at him, and he stopped, and he seen we were leaking water. There was a dead calm, and the damage was about two or three feet above the water line, and we thought we could make it

(Testimony of Anthony Di Leva)

easy in—we had a big pump—so we kept pumping it out and we made it in all right.

The Court: Into where?

The Witness: San Pedro.

The Court: You did not fish any more? [43]

The Witness: No, sir.

The Court: Did you pull your net in?

The Witness: We hadn't lowered the net, your Honor. We were just ready to. We were all ready to lower it.

By Mr. Lande:

Q. How long was your vessel laid up for repairs?

A. About 11 days.

Q. During that time the sardine fishing was in progress?

A. Yes, it was.

Q. Did you see the other sardine vessels of like size and type as yours come into the Harbor?

A. Yes, they were all coming in. They were coming in all loaded.

Q. What types of load did they have on board?

A. They had a lot of full loads. It was very good that season.

Q. That week you missed was very good fishing?

A. Yes, we did.

Mr. Toner: If the Court please, I would like to object to the last question and answer and move that the answer and question be stricken because I don't believe that this witness was qualified properly to testify on the subject.

The Court: I do not think it makes much difference because "very good fishing" does not mean much to me. [44]



(Testimony of Anthony Di Leva)

By Mr. Lande:

Q. Tell the Court—you saw these other fishing boats come in? A. Yes, we did.

Q. They were loaded with sardines?

A. Every day.

Q. How many tons of fish does your vessel carry?

A. A full load, about 100 ton.

Q. What was the price of sardines at that time?

A. \$22 a ton.

Q. But for this accident—

The Court: How long does it take you to get—well these other boats you said came in, how long were they out fishing?

The Witness: Over night, your Honor.

The Court: Over night, sardine fishing.

By Mr. Lande:

Q. They were fishing locally for sardines?

A. Locally.

The Court: Were there any other fishing boats in this immediate area?

The Witness: No. I think we were the only two in that area at that time.

The Court: Do you know whether or not any other boats got into that same school of fish? [45]

The Witness: No, we didn't.

The Court: Did the Gloria R play out her nets and fish?

A. No, she came in.

The Court: Is she a sardine boat?

The Witness: She is.

The Court: Was she injured?

(Testimony of Anthony Di Leva)

The Witness: Well, no, just the guard was smashed—not smashed, it was just dented where it smashed our bow. You could see our bow was—your Honor, when a boat hits anything headon you are going to push that bow in, that bow is going to go in, but if anything gives it a sideswipe this bow is going to be pushed towards where it is swiped.

The Court: Yes.

The Witness: This is the way our bow was pushed, slanted to starboard.

The Court: Where was the hole?

The Witness: The hole was right about there (indicating).

The Court: Right in the bow?

The Witness: No right where the guard hit us, in the bow. The bowstep was pushed over.

The Court: How big was the hole?

The Witness: Well, the whole stem had to be renewed, all up and down.

The Court: So the leakage came from the removal of the [46] stem?

The Witness: That is right.

By Mr. Lande:

Q. Assume now that this is the Gloria R, what part of the Gloria R hit you?

A. Right aft the rigging, right here. (Indicating) When he turned like this, this part here just pushed our bow out. (Indicating)

The Court: How big was his vessel?

The Witness: It was just about the same sized vessel.

(Testimony of Anthony Di Leva)

By Mr. Lande:

Q. How many foot boat is yours?

A. About 73.

Q. What tonnage is your boat?

A. Fifty-five gross tonnage.

Q. Gross or net?            A. I think it is net.

Mr. Lande: All right. You may cross-examine.

Just a minute. Your Honor, I believe I should go into the question—we have put the evidence in now for the collision. Would the Court like to hear the testimony as to who he was working for and what his arrangement was?

The Court: I do not know. It is your lawsuit.

By Mr. Lande:

Q. Mr. Di Leva, when did you first go on this boat as [47] captain?

A. The previous year—no, more than that—about '41.

Q. Who owned the vessel at that time?

A. Van Camp.

Q. Did you and your father have a charter with them?

A. Yes, we did.

Q. There was a written charter at that time?

A. Yes, sir.

Mr. Toner: Just a minute, if the Court please. I would like to object to the question and move that the answer be stricken because the proper foundation for such an answer has not been laid.

The Court: Did you have a charter, a written charter?

The Witness: Yes.

(Testimony of Anthony Di Leva)

The Court: I suppose he is going to produce the charter.

Mr. Lande: It is in evidence, your Honor.

The Court: It isn't in evidence now because all of the previous proceedings have been vacated.

By Mr. Lande:

Q. I will show you this document entitled "Charter Party," and ask you if you recognize the signatures thereon.

Mr. Toner: If the Court please, I would like to object to the introduction of this document without having this witness properly qualified as having seen the document or know- [48] ing anything about it.

The Court: I understand that is what he is doing.

Mr. Lande: That is what I understood.

Q. Have you seen this document before?

A. Yes, sir.

Q. Do you recognize the signatures of Mr. Gillis and that of your father? A. Yes, I do.

Q. Was there any document such as this executed between you and your father and the Van Camp Sea Food Company after this was executed? A. No.

Q. That is the only one?

A. That is the only one; yes.

Mr. Lande: May this be introduced for the purpose of identification only, your Honor?

The Court: It will be marked for identification.

The Clerk: Libelant's Exhibit No. 1 for identification.

(The document referred to was marked Libelant's Exhibit No. 1 for identification.)



[LIBELANTS' EXHIBIT NO. 1—Identification]

CHARTER PARTY

This Charter Party, made this 11th day of September, 1941, by and between Van Camp Sea Food Company, Inc., hereinafter referred to as the Owner, and Salvatore Di Leva, hereinafter referred to as Charterer;

Witnesseth:

That the Owner hereby agrees to let and the Charterer agrees to hire the Oil Screw Fishing Boat 'Bessemer' from the time of delivery hereof by the Owner to the Charterer and continuing thereafter until the first day of October, 1942, upon the terms and conditions herein set forth:

1. The Charterer agrees that he has examined the said Oil Screw 'Bessemer' and knows the condition thereof and he admits, acknowledges and agrees that said vessel is in good and seaworthy condition and is suitable for the fishing trade in which he will be engaged, and that all her machinery and gear are in good running condition and repair. The said vessel will be used in the fishing trade in the waters immediately adjacent to San Pedro and usually fished by vessels fishing therefrom, and all fish caught by said vessel or by the use thereof shall be delivered and sold by the Charterer to the Owner. The Owner shall pay to the Charterer the market price for any fish accepted by it.

2. The Charterer shall provide and pay for all provisions, consular shipping and discharge fees and for all

(Libelants' Exhibit No. 1—Identification)

necessary fishing equipment. The Charterer shall furnish and maintain in an efficient state a net or nets suitable for the Southern California fishery in which the vessel is to engage, namely, tuna, mackerel and sardine. The Charterer shall provide and pay for all fuel, lubricating oil, water, port charges and all other matters and things required in the efficient operation of the said vessel.

3. The Owner will provide and pay for hull insurance on the vessel and protection and indemnity insurance in the usual form and upon the Owner's fleet policy. Failure to keep the said vessel insured shall not constitute a breach of this Charter Party nor shall damages be allowed therefor. The loss of the said vessel or such a partial loss as will incapacitate the vessel from use for a period of longer than thirty (30) days shall terminate this Charter.

4. Neither the Owner or the Charterer shall make any allowance for fuel oil or surplus supplies now on the vessel or which may be thereon at the termination of this Charter.

5. The net proceeds earned by the said vessel computed according to the usual custom in the port of San Pedro for fishing vessels of this size and type operating therefrom, shall be divided into  $18\frac{3}{4}$  shares. Three ~~and one-half~~ (3) shares from said  $18\frac{3}{4}$  shares shall be paid by the Charterer to the Owner for the use and hire of the said vessel; the remaining shares shall be divided among the crew, the master and owner of the net, in full com-

## (Libelants' Exhibit No. 1—Identification)

pensation for the use of the net and the services of the members of the crew. Said charter hire shall be paid immediately after the settlement made by the Charterer with his crew for the computation of the shares. The Charterer shall employ all of the crew of the said vessel, including the captain and engineer, but it is understood that the Charterer shall be and act as Master of the vessel and shall receive as his compensation a sum equivalent to  $1\frac{1}{4}$  shares which shall not, however, be paid by the Owner or out of the boat's share of the earnings. The Charterer shall provide a competent engineer to handle the machinery of the said vessel and the Owner shall have the right to require the immediate removal and discharge of any engineer employed by the Charterer who may be unsatisfactory to the Owner. The Mast Man will receive  $\frac{1}{4}$  of a share extra.

6. The Owner is negotiating for the purchase of the said vessel from its present owner and in the event the vessel should be lost or damaged so that it cannot be repaired within sixty (60) days or in the event for any reason the Owner does not obtain title to said vessel, then and in that event this Charter shall terminate and be of no effect for any purpose.

7. The Charterer will keep and maintain the said vessel and her hull and machinery in good condition, reasonable wear and tear excepted; provided, however, that if any major repairs or overhauling are necessary during the term of the charter, said major repairs or overhaul shall



(Libelants' Exhibit No. 1—Identification)

be paid for by the Owner, it being the intent of this agreement that the Charterer shall provide and pay for the usual maintenance work done on vessels in the trade by members of the crew.

8. Neither party shall be liable to the other for any loss of time or other damage, other than damage to the vessel or machinery, caused by the loss of use of the vessel by any reason whatsoever, including defects to hull or machinery. Neither party shall be liable for any loss occasioned by acts of God, enemies, restraint of Princes, Rulers or People, and all danger and acts of the seas and errors of navigation.

9. The Charterer agrees to abide by all the laws, rules and regulations of the United States and the State of California in the operation and use of said vessel, and that he will not permit said vessel to be used or operated in any waters which are closed to vessels of the type or using the gear as this vessel.

10. The Owner may terminate this charter in the event the Charterer, or any member of the crew of the *New Roma*, brings any action or suit against Louis Di Meglio or any other boat owner delivering fish to the Owner, or brings any action in rem against any vessel delivering fish to the Owner.

11. Neither the Charterer nor any master, engineer, or any other person employed by him, shall have any power or authority to bind the vessel or the Owner by way of maritime lien or otherwise upon any contractual obligation



(Libelants' Exhibit No. 1—Identification)

or otherwise, either for the purchase of necessary supplies or for any other purpose.

12. Should any dispute arise between the parties hereto the matter shall be submitted to the arbitration of three persons, one to be selected by the Owner, one by the Charterer and the two thus selected to select a third, and the decision of a majority of the three shall be final and binding upon the parties hereto.

In Witness Whereof, the parties herto have hereunto set their hands the day and year first above written.

VAN CAMP SEA FOOD COMPANY, INC.

By M. Gillis

(Owner)

Salvatore Di Leva

(Charterer)

No. 4360-BH adm. Libs.' Exhibit No. 3. Filed May 16, 1946. Edmund L. Smith, Clerk; by M. E. W., Deputy Clerk.

Case No. 4630-PH. Di Leva vs. Van Camp. Libelants' Exhibit No. 1. Date Oct. 30, 1947. No. 1 Identification. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

By Mr. Lande:

Q. For subsequent seasons for sardines and for fishing other types of fish, you never had any other type of written agreement with Van Camp? A. No. [49]

Mr. Toner: I object to the question as leading.

The Court: It is leading, but he has answered it.

(Testimony of Anthony Di Leva)

By Mr. Lande:

Q. Now during the sardine season in question here, that is, the one beginning in October 1944, was there any written agreement between you and Van Camp?

A. No, there wasn't.

The Court: Just a moment now. On this Exhibit 1, you took the boat out on or about the date which it bears and continued to operate it for the term prescribed in there until the 1st of October, 1942, is that right?

The Witness: We did.

The Court: Did you subsequently take the boat out and do the same things you did under this charter?

The Witness: Yes.

The Court: And receive the same share?

The Witness: Same thing; yes, all the time.

The Court: All the way through?

The Witness: All the way through.

The Court: With the Van Camp Sea Food Company?

The Witness: Yes.

The Court: And continually up to the date of the accident?

The Witness: Yes, sir; we did.

The Court: All right. [50]

By Mr. Lande:

Q. During the time you had the vessel, whereabouts were you to deliver your fish?

A. Van Camp Sea Food Company.

Q. Who gave you checks in payment of your shares?

A. Van Camp Sea Food Company.

Q. Did Van Camp Sea Food Company deduct from your checks the social security amounts?

A. Yes, they did.

(Testimony of Anthony Di Leva)

Q. Who put you on the vessel as master?

A. Mr. Gillis.

Q. Of Van Camp Sea Food Company?

A. Van Camp Sea Food Company; yes.

Mr. Lande: You may cross-examine.

### Cross-Examination

By Mr. Toner:

Q. Tony, how long have you been fishing?

A. About 12 years steady; off and on about 15 or 16 years.

Q. How old are you now?

A. I am 27.

Q. Are you familiar with fishermen's customs in the Bay?

A. With all the fishermen's customs, I am familiar.

Q. In this area? [51] A. I am.

Q. Will you show the Court, using the model, where the lights are put on when you are on fish?

A. There would be some argument about that.

Q. Where on the model, or in the literature?

A. When you are on fish?

Q. Yes.

A. Well, when you are on fish you usually don't put any lights, just when you are lowering.

Q. Just when you are what? A. Go ahead.

Q. What was the last thing you said?

A. There is no lights when you are on the fish.

Q. There are red lights on the mast aren't there?

A. There is red and white.

Q. Will you describe the red lights on the mast, where they are? Point them out.

(Testimony of Anthony Di Leva)

A. There is a red light and a white light. There is a running light and a white light on top when you are running, and there is a red light when you are going to lower the net in the water.

Q. Where on the model is the red light?

A. Right above the white.

Q. You put that on when you are going to lower the net in the water? [52]

A. That is right.

The Court: That is at the top of your mast?

The Witness: At the top of your mast.

By Mr. Toner:

Q. How far apart are these lights?

A. Five to 10 feet; it depends on the boat?

Q. How far apart were they on the Bessemer?

A. About 10 feet.

Q. And the white light is on top?

A. Not 10 feet; 5 probably.

Q. I am not trying to confuse you. I want to know what it is.

A. I don't want to get confused either.

Q. Say about 5? A. About 5; yes.

Q. The white light is on top?

A. No, the red light is on top on our ship.

Q. On the Bessemer the red light was on top?

A. That is right.

Q. And that is the red light you use when you are going to lower the net?

A. Yes, that is right.

Q. Now another custom of fishermen that I would like to ask you about is this: What direction do you customarily run the circles around the school of fish? [53]

A. Well, you usually run counter-clockwise.



(Testimony of Anthony Di Leva)

Q. That is the custom, to run a counter-clockwise circle?

A. That is when you see the fish steady. When you see the fish steady you usually run counter-clockwise, but in the instance where we were, when the moon was up and you couldn't barely see them, you hear the fish flipping, breaking water, you listen to where you hear the biggest body of fish jumping, and that is where you turn.

Q. And it is usual, is it not, to run a clockwise circle?

A. Sometimes it is; not all the time.

Q. But usually you run counter-clockwise circles?

A. Yes.

Q. And exceptionally you run a counter-clockwise circle? A. That is right.

Q. How big a circle did you usually make around the fish?

A. Not very big. It depends on the school of fish.

Q. How big a circle were you making that night?

A. I would say about—you mean the width of it?

Q. Yes, the diameter of the circle.

A. Oh, about a hundred yards, I guess.

Q. Where were you on the boat? [54]

A. I was on the mast.

Q. Is that the white object on top of the mast in the model? A. Yes, the lookout.

Q. That is what you call the mast-man?

A. Yes.

Q. You were what was called the mast-man?

A. Yes.

Q. What is the mast-man's job?

A. To look for fish.

(Testimony of Anthony Di Leva)

Q. I suppose when the fish are in the vicinity you are very anxious to get the fish, aren't you?

A. That is true.

Q. And you keep your eye pretty well peeled for the fish?

A. That is true.

Q. Were you looking at the fish all the time you were making these circles?

A. No, I wasn't. I seen the Gloria R all the time.

Q. You were looking at the Gloria R all the time?

A. No, I didn't say that. I said I was looking at the fish and I seen the Gloria R all the time.

Q. And you also saw the fish all the time?

A. Also seen the fish because you could barely see them, you could hear them. You could hear them flipping. [55]

Q. Do you have a whistle aboard the vessel?

A. Yes, we have.

Q. Did you blow the whistle at any time before the collision?

A. There was no chance to blow the whistle, it happened so fast.

Q. Where was the Gloria R when you saw him just before the collision, when you last saw him just before the collision?

A. He was in front of our bow then. That is when I hollered "full speed reverse," and it was all they could do to reverse the engine full speed to try to clear ourselves.

Q. How far away was the Gloria R from the bow of the Bessemer when you yelled "full speed reverse"?

A. We were just ready to hit.

Q. In feet. A. I would say 40, 50 feet.

(Testimony of Anthony Di Leva)

Q. Forty or 50 feet?      A. That is all.

Q. And she was then directly ahead of your vessel?

A. No, not directly yet, she was just crossing our bow then.

Q. Where was her bow with reference to your bow?

A. Say her bow was just coming right like this (indicating), right here, cutting across our bow. I yelled [56] to him "reverse full speed" and naturally the boat that has the forward motion, you can't stop, you can't put no brakes on. By the time you reverse it—there is a man on the controls, and by the time he reversed it full speed reverse you still got that forward motion for about a minute or so.

Q. Do you know what the center line of your fishing boat is, the fore and aft center line?

A. What do you mean?

Q. Running from the stem back to the center of the stern, that would be the center line of your vessel?

A. That is right.

Q. If you extend the center line of the Bessemer out 50 feet forward at this particular time when you yelled "full speed reverse," was the bow of the Gloria R over that line or was it at that line or was it near that line?

A. It was near that line then.

Q. How close to the line would it be?

A. His bow you mean?

Q. His bow.      A. Just about right like I said.

The Court: You mean a foot or two from the line?

The Witness: Yes, that is right.

The Court: Or a foot or two from your actual bow?

The Witness: That is right.

The Court: Which, now? [57]

(Testimony of Anthony Di Leva)

The Witness: A foot or two from our bow.

The Court: From your actual bow?

The Witness: Bow; yes.

By Mr. Toner:

Q. That is when you said "full speed reverse," or whatever you said? A. Yes.

Q. What exact words did you use?

A. I said in Italian what meant "full speed astern."

Q. How long does it take the Bessemer to go from slow ahead to full astern?

A. I never timed it but it takes a minute or two.

Q. Is it a direct reversible engine?

A. No, it isn't; it is a clutch.

Q. You have to take it out of slow ahead and—

A. Yes, that is right.

Q. Just describe the operation.

A. That is all it is. It is a little wheel here, you just throw the clutch in, I guess turn it half in, or ahead, I mean, to take it out and then turn a half to stern.

Mr. Toner: Let the record show that the witness is describing a wheel of about a foot in diameter.

The Witness: Yes.

Mr. Toner: And making circles, sometimes one way and sometimes in the opposite direction. [58]

The Witness: That is for ahead and to take it ahead, and this is to go in reverse.

By Mr. Toner:

Q. Where is this wheel, this control wheel?

A. It is right next to the wheel, the steering wheel.

Q. Who runs that control?

A. I had my brother on there. There is a control man and a wheel man.



(Testimony of Anthony Di Leva)

Q. One man is at the control and the other man is at the wheel?      A. Yes, sir.

Q. How many turns does it take to go from slow ahead to take the motor out of gear?

A. About a turn and a half.

Q. A turn and a half?      A. Yes.

Q. Then what do you do?

A. Then you take a turn and a half to go reverse. Then you have to speed the engine up.

Q. Do you have a separate throttle for speeding the engine up?

A. Yes, we have. That is right above the clutch to go ahead and reverse.

Q. Your control went through those motions?

A. Yes, he did. [59]

Q. And actually the vessel was going full astern at the time of the collision?

A. It was going full astern—it wasn't going full astern, we had the engine full astern but the boat still had the forward motion. The vessel had the forward motion.

Q. The vessel was actually continuing forward because the propeller had not yet caught to bring her astern?      A. That is right.

Q. How fast were you going before you put the engine full astern?

A. About a mile, mile and a half.

Q. How fast were you going when the bow of the Bessemer collided with the Gloria R?

A. Say that again, please.

Q. How fast was the Bessemer going when the bow of the Bessemer collided with the Gloria R?

A. As I say, we had the engine full speed reverse.

(Testimony of Anthony Di Leva)

Q. How fast were you going forward?

A. I won't say, about half a mile not even, quarter of a mile, something like that.

Q. A half mile or what?

A. About a quarter of a mile say.

Q. A half mile or a quarter of a mile?

A. A quarter, I would say.

Q. Is that correct? [60]                      A. A quarter.

Q. Where was your father on the vessel?

A. He was on the wheel, this wheel here to steer the boat.

Q. Is he in court today?

A. No, he is up in the mountains.

Q. When did he leave to go to the mountains?

A. He left Monday. He didn't know nothing about this. In fact, the trial was postponed until next month, the 20th, something like that next month, and he just left.

Q. He didn't testify at the last trial either, did he?

A. No, he didn't.

The Court: The trial was not postponed.

The Witness: I mean it was supposed to, and then it came back on the calendar again. That is the way I understand it.

Mr. Toner: If I may insert the remark—

The Court: I think we will have a short recess.

. (Short recess.)

By Mr. Toner:

Q. Tony, you didn't have time to blow the whistle before the collision?                      A. No, I didn't have time.

The Court: Where is the blower for the whistle?

The Witness: Right above the helmsman here. [61]

(Testimony of Anthony Di Leva)

The Court: And the helmsman blows the whistle?

The Witness: Yes.

The Court: How far away was the Gloria R when you first saw it heading towards your boat?

The Witness: Well, as I say, your Honor, we were listening for the fish when I first seen him. It was his red light. I thought he was going to come past our stern. Then after I seen the red and green—

The Court: How far away was he when you first saw the red and green?

The Witness: I would say about 150 yards away.

The Court: Then what happened?

The Witness: Then I talked to my father, I heard them flipping on this side again, the right side, he was ready to lower the net, then all of a sudden I seen the green light instead of the red and green.

The Court: How far away was he then, about?

The Witness: He was just ready to cross our boat?

The Court: Ten or 15 feet?

The Witness: About 25 or 30, I guess.

The Court: And he was going about seven knots all the time?

The Witness: About eight knots, I would say.

The Court: All right. [62]

By Mr. Toner:

Q. Did you testify that Mr. Gillis of Van Camp Sea Food Company put you on as master?

A. Yes, she did.

Q. When was that?

A. Mr. Gillis and Mr. Lindy too.

(Testimony of Anthony Di Leva)

Q. Mr. Lindy and Gillis? A. Yes.

Q. Who are they? What position do they occupy?

A. I think Mr. Gillis is the vice president. Mr. Lindy is the general manager.

Q. When you went out with the Bessemer in the earlier part of the evening, where did you fuel?

A. Van Camp Sea Food. We had the fuel already on the boat.

Q. Where did you get the fuel on the boat?

A. From Van Camp Sea Food Company.

Q. From their oil dock?

A. Yes. They have their own oil dock.

Q. They provided the fuel for the vessel?

A. No, we got the fuel at the Van Camp oil station, but they don't provide the fuel.

Q. To whom was it charged?

A. It was charged to us, the crew.

Q. Wasn't it charged to the vessel? [63]

A. To the vessel, yes, but we paid for the fuel.

Q. How was it paid, by check?

A. Yes, it was paid by check.

Q. Who paid the check?

A. Van Camp out of our fish account.

The Court: They deducted it from your lay?

The Witness: Yes, that is expenses.

By Mr. Toner:

Q. That is part of the gross expenses that is deducted before your share comes out? A. That is right.

Q. But Van Camp Sea Food actually made out the check for the fuel?

A. They make out the check. He makes the figures out for us.



(Testimony of Anthony Di Leva)

Q. Who do you mean by "he"?

A. We have, say, 10,000 pounds of fish, and they have their own public accountant there, and he splits the money for us.

The Court: In other words, he takes the value of the lay, then gives you an account, so much for fuel deducted and so much for this and that?

The Witness: Yes, so much for the boat's share. He takes the boat's share and then he gives us the net share and he gives us a half share for running the boat. [64]

By Mr. Toner:

Q. But you actually never pay any money or make out any checks for fuel or groceries or oil or any of the running expenses of the ship?

A. What do you mean, make out the checks?

Q. You don't actually pay the man who put the oil on board?      A. Yes, we do. We do pay the man.

Q. It is charged back to you but you don't actually have anything to do with them, do you?

A. Yes, we are the ones that are making the pay. If we don't pay that bill he don't pay it.

The Court: What you mean is that you do not physically hand the money to him?

The Witness: He sends the bills right to the cannery and when we make a pay day he says there are so many bills, so much for the oil, and so much comes out of our pay.

By Mr. Toner:

Q. And the cannery tells you that they have paid the fuel bill and it is so much and they charge it back to you?

A. We are paying the cannery because the cannery paid the bill.

(Testimony of Anthony Di Leva)

Q. That is right, the cannery pays the bill and you pay the cannery back. A. Yes, that amount. [65]

Q. Who pays the maintenance of the boat, the boat painting and the upkeep and engine repairs?

A. Van Camp pays that because that is their boat.

Q. You don't pay that?

A. No, not maintenance of the boat. We pay the maintenance of the net, not of the boat.

Q. That is correct. Then who pays the withholding tax? A. Everybody does.

Q. Is that taken out by Van Camp?

A. Yes. As I say, the public accountant is there, he takes the withholding tax out.

Q. Are there any other deductions that are made from your net shares? A. No.

The Court: You mean the share of the net or from the net shares that go to the individual?

Mr. Toner: I am sorry.

Q. From the shares that you get finally after all expenses are paid, what other expenses are taken out?

A. There is groceries, that is all.

Q. How about the union dues?

A. No, you pay the union dues yourself.

Q. The individual fishermen pay the union dues?

A. Yes. [66]

Q. Isn't there some boat owners' association?

A. There is. They get half of 1 per cent.

Q. That is paid by Van Camp?

A. That is paid by Van Camp out of our check.

Q. That is deducted from the gross expenses?

A. Yes, from our check, from each individual check.

Q. It is a deduction? A. It is a deduction; yes.

(Testimony of Anthony Di Leva)

Q. Now, Tony, you said that before the collision the two boats were red to red?      A. Yes, they were.

Q. Is that correct?      A. Yes.

Q. That means that you could see the Gloria R's red light and the Gloria R could see you red light?

A. That is true.

Q. Will you come down to the diagram here and draw in over in this position the Bessemer about that big, indicating a couple of inches, and showing the Bessemer in the direction that the Bessemer was when you saw the Gloria R's red light and when they could see your red light.

A. (Drawing on blackboard) After making a circle?

Q. When you said that they were red to red.

Mr. Lande: At what position?

Mr. Toner: At any time when they were red to red, when [67] the two boats were red to red.

The Court: He said they were red to red there when he was in position 3 or 4 and they were in position C.

The Witness: They were at C.

By Mr. Toner:

Q. I want you to put in the relative direction of the two vessels. Would you draw in a big vessel there, when you are at position 3?

A. This should be a little longer. (Drawing on blackboard)

Q. Now put in an "R" for the red light and a "G" for the green light.      A. (Drawing on blackboard)

The Court: Whose boat is that?

Mr. Toner: That is the Bessemer in blue.

The Witness: The Bessemer.

(Testimony of Anthony Di Leva)

By Mr. Toner:

Q. Now put in the direction of the Gloria R when the two vessels were red to red.

A. (Drawing on blackboard)

Q. Now put in an "R" and a "G" there.

A. (Drawing on blackboard)

Q. And put in "G" for the Gloria R.

A. (Drawing on blackboard)

Q. Neither of these running lights are screened, are [68] they? A. Yes, sir, they are.

Q. Will you describe the screens?

A. What do you mean, describe them?

Q. What do the screen boards look like. What do they do? A. Here they are, right here (Indicating)

Q. That can't be seen in the record.

A. That is exactly the same thing here. There is the boards, and then they have the light inside of the screen so it won't spread too far, the light.

Q. How far to either side of dead ahead can the running lights be seen? A. How far?

Q. Yes.

A. Oh, my God, you can see them for two or three miles.

The Court: Do you mean in degrees of a circle?

By Mr. Toner:

Q. Can you see the green light to the right-hand side of a vessel—to the left-hand side of a vessel, I mean? In other words, you have the inboard screen. What does that do?

A. You mean this? If he is giving red and red you can't see his green. [69]



(Testimony of Anthony Di Leva)

Q. Because of the screen?

A. The only time you can see his green is, say he turns a little to port, you can see his red and green. If he turns it hard over then it just shows green.

Q. You can't see the green because of this inboard screen, is that right?

A. No, it is not; you can't see because it is on the opposite side of the vessel.

Q. A running light is visible from dead ahead?

A. Dead ahead.

Q. And to one side?                      A. To one side; yes.

Q. That is the only point I wanted to bring out. I believe that is all.

The Court: Redirect?

Mr. Lande: Yes, your Honor.

Redirect Examination

By Mr. Lande:

Q. Mr. Di Leva, what is the custom of San Pedro fishermen in regard to putting on the red light while fishing?

A. Well, the custom is that the red light is put on—

The Court: That is the mast light?

The Witness: Yes—when you are lowering the net. But a lot of them put it on, which sometimes they practice to scare the other boats, approaching boats, away because they [70] know that the red light means that the net is in the water, and naturally when they are off fish they put the red light on sometimes to scare them away from the vessel.

By Mr. Lande:

Q. That isn't a fair operation?                      A. No, it isn't.

(Testimony of Anthony Di Leva)

Q. Tell the Court what the true custom is in putting the red mast light on.

A. Putting the red mast light on is to signify you are lowering your net, or your nets are lowered.

Q. Had you lowered your net at any time before the collision?

A. No, we didn't. We were just ready to.

The Court: Was your red mast light on?

The Witness: No, it wasn't.

The Court: Was your white running light on?

The Witness: No, it wasn't. When you are running for fish your white light isn't on, just your red and green light, because it throws light and you can't see the fish.

Mr. Lande: That is all.

#### Recross-Examination

By Mr. Toner:

Q. Tony, when you spoke of the white light you mean the raised light on the mast? A. Raised light. [71]

Mr. Toner: That is all.

#### Redirect Examination

By Mr. Lande:

Q. Whose net was on that boat?

A. Our net.

Q. How many shares did you receive for the use of your net? A. Two and a half shares.

Q. And how many crewmen did you have on board?

A. Thirteen.

Q. How many shares did each crewman get?

A. One share.

Q. How many shares did you get as master?

A. We got one and a half.

(Testimony of Anthony Di Leva)

Q. Whose half was that taken out of, the crew?

A. Of the boat's share.

Q. How many shares did the boat then have?

A. The boat had three and a quarter.

Q. Three and a quarter, and a half to you as master?

A. Yes, so he got two and three-quarters and we got three.

The Court: Who?

The Witness: The boat. After he deducted the half a share.

The Court: You got one for the master? [72]

The Witness: No, my working share and half a share for running the boat.

The Court: There were 13 other men besides you?

The Witness: That is right.

The Court: So there were 14 crew members?

The Witness: No, 13 altogether.

The Court: So there were 12 besides you?

The Witness: Yes.

The Court: There were 19 shares then?

The Witness: Nineteen and three-quarters.

Mr. Toner: I think there are eighteen and three-quarters.

The Witness: I mean eighteen and three-quarters. You are right.

Mr. Lande: Nothing further, your Honor.

The Court: Step down.

(Witness excused.)

Mr. Lande: Salvatore Carnevale.

SALVATORE CARNEVALE,

called as a witness by and on behalf of the libelant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Salvatore Carnevale.

The Clerk: Will you spell that name?

The Witness: C-a-r-n-e-v-a-l-e. [73]

The Clerk: Your address?

The Witness: 465 16th Street, San Pedro.

Direct Examination

By Mr. Lande:

Q. Mr. Carnevale, whereabouts were you on the Bessemer the night of the collision?

A. I was alongside the captain, the one who got the wheel.

Q. You were alongside the man at the wheel?

A. Yes.

Q. Did you see the Gloria R before the collision?

A. Yes.

Q. What light did you see on the Gloria R at that time? A. Red light.

Q. What light on your boat was facing the Gloria R?

A. Red light too.

Q. You were red to red? A. Yes.

Q. Tell the Court what happened after that.

A. Well—

The Court: Tell us how far away the Gloria R was when you saw the red light.

The Witness: It was about 150 yards, maybe 200 yards, something like that. I can't measure that, but I can imagine [74] about 150 yards to 200 yards.



(Testimony of Salvatore Carnevale)

The Court: Then what happened?

The Witness: They were circling on top of the fish and we passed right on top of the middle of the fish, we make another circle again and we pass that middle of the fish again, we make another turn on the right just ready to set the nets and all at once the Gloria R come right straight before the stern. Only once he turns the wheel and he passed by full speed all the time and never slowed down. And Tony, he started to holler, "Back up, back up." We started to back up all at once and they go right past us with the same speed all the time. When about half-way he turned the wheel and he pushed all this (indicating) to this side and he hit us, and he make a turn again and asked us how you are, bad leak or something on the boat. We say we can make it to San Pedro. Then we started to go to San Pedro.

By Mr. Lande:

Q. Did you see the green light of the Gloria R as she swung in front of you?

A. Yes.

Q. About how fast was she going when she swung in front of you?

A. She was in full speed all the time, never slowed down until she hit us. After she hit us she slowed down.

Q. What is full speed of a vessel like the Gloria R? [75]

A. I imagine about seven, seven and a half, eight. They don't make no more than that, that kind of a boat.

Mr. Lande: That is all, your Honor.

The Court: Cross-examine.

(Testimony of Salvatore Carnevale)

Cross-Examination

By Mr. Toner :

Q. You were in the pilot house?

A. On top the pilot house.

Q. On top the pilot house? A. Yes.

Q. Who was there with you?

A. Tony's father and his brother Mike.

Q. What is Tony's brother's name?

A. Mike.

Q. Who was at the wheel? A. His father.

Q. That is Salvatore? A. Yes.

Q. Who was at the control? A. His brother.

Q. How long does it take to go from slow ahead to full astern? A. One second.

Q. One second?

A. Just a turn like this (indicating); just turn the [76] wheel like that, that is all, one to two seconds.

Q. What do you have to do?

A. That is all. Just take the wheel, turn it around like this, back up, and then you give it the power. (Indicating.) You have the power right close to you. You push it like that and get more power to back up. (Illustrating.)

Q. How many turns do you have to give the wheel?

A. A turn and a half.

Q. And to take it out of gear?

A. A turn and a half, and a turn and a half to put them in gear again in back.

Q. What were you doing on the pilot house?

A. Every night I stand still alongside of him all night long every day, ever since I have been fishing with him.

(Testimony of Salvatore Carnevale)

Q. Were you a lookout?

A. I looked for the fish too.

Q. You were looking for the fish?

A. Yes, I look for the fish. I was on top to give a little help.

Q. Where was the school of fish when you saw the Gloria R make this turn?

A. Pretty close in front of Avalon.

Q. Where with reference to your boat was the school of fish? How far away from your boat was the school of fish? [77]

A. It was alongside the boat. We make a circle all the time alongside.

Q. Which side of your boat was the school of fish on?

A. On this side.

Q. On the port side?                      A. Yes.

Q. How big was the school?

A. Maybe a hundred ton, maybe 50, maybe 75—nobody knows. If you don't catch them, you don't know. It was a big school.

Q. It was a hundred yards across?                      A. Yes.

Q. A big school?                      A. Yes.

Q. How much?                      A. A big school of fish.

Q. Did it extend back to the stern of the boat?

A. About 50, 75 yards.

Q. Did the school extend to the port stern?

The Court: He said 75 yards.

By Mr. Toner:

Q. Did you say you heard Tony holler "wake up"?

A. What?

(Testimony of Salvatore Carnevale)

Q. Did you say you heard Tony holler "wake up"?

A. He said, "Back up, back up." [78]

Q. And he was hollering to you down in the pilot house?

A. Yes.

Q. The Gloria R only made one turn?

A. No, they made two or three turns.

Q. The Gloria R?

A. They made two this way all the time. (Illustrating)

Q. You mean the Bessemer made two turns?

A. Yes. The Gloria R was so far away, a little far at first, then come in closer to us all the time. He wants to take our fish.

Q. They wanted to take your fish away?

A. If he didn't want to take our fish he would pass far away because there are only two boats on a hundred miles of ocean. I never seen any boats all night, just the two boats.

Q. You didn't have your red light on?

A. We have red and green.

Q. The red on the mast?

A. No, because we never set the nets. We never got the nets in the ocean.

Q. Did you have the skiff in the water?

A. We have the skiff in the water and two men in the skiff. [79]

Q. Did you have any part of a net in the skiff?

A. No, just the end of the nets.

Q. The rope at the end of the nets?

A. Yes.



(Testimony of Salvatore Carnevale)

Q. If you wanted to keep the Gloria R away you would put on your red light, wouldn't you, on the mast?

A. No, it is worse, because when you put the red light on he wants more than ever to come and steal your fish.

The Court: You put the red light on and they come and steal your fish?

The Witness: Yes, another boat come in and want to steal our fish, and you get an argument a lot of times.

The Court: So you do not put your red light on until the nets are down?

The Witness: Until the nets are down.

By Mr. Toner:

Q. You didn't have the white light on the mast?

A. No, because you can't see the fish. It shines too much white.

Q. You leave the white light off because you can't see the fish then?

A. No, just put the green and red.

Q. How long have you been on the Bessemer?

A. Maybe a couple of months, three months, something like that. [80]

Q. Have you been with the same crew ever since?

A. Oh, yes; same crew.

Q. What boat are you on now?      A. Victoria.

Mr. Toner: That is all.

The Court: Step down.

(Witness excused.)

Mr. Lande: Jack Olsen.

JACK OLSEN

called as a witness by and on behalf of the libelant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Jack Olsen.

The Clerk: S-e-n?

The Witness: Yes.

The Clerk: Your address?

The Witness: 1147 22nd Street.

The Clerk: San Pedro?

The Witness: San Pedro; yes.

Direct Examination

By Mr. Lande:

Q. Mr. Olsen, what is your occupation?

A. Engineer and fisherman.

Q. How long have you been an engineer?

A. Oh, for 18, 20 years, off and on. [81]

Q. How long have you been a fisherman?

A. Well, I would say for about 38 years.

Q. Were you on the Bessemer the night of the collision?

A. I was.

Q. Whereabouts on the Bessemer were you?

A. I was standing in the midships on the port side.

Q. Will you step over to the model and indicate to the Court just where you were?

A. Right here. (Indicating)

The Court: Amidship, port side?

The Witness: Yes, that is correct.

By Mr. Lande:

Q. Did you see the Gloria R before the collision?

A. Yes, I did.

(Testimony of Jack Olsen)

Q. What lights did you see on the Gloria R?

A. Red.

Q. How far away was the Gloria R about that time?

A. I should say about 300 yards.

Q. What did you do next? What happened next?

A. I turned around and talked to the man standing by to let go the skiff. I said, "I think we will get a load out of this," and when I turned around then I saw the Gloria R's green light.

Q. About how long do you think it was between the time [82] you saw her red light and the time you saw her—you turned around and talked and then saw her green light again?

A. Oh, maybe a minute.

Q. Then what happened after that?

A. Well, I saw the two boats were going to come together, so I said, "You better brace yourself, you are going to get hit and hit hard."

Q. What happened?

A. Then I heard the engine went in reverse.

Q. Then what?                      A. Then we hit.

Q. Did you see the actual collision from where you were standing?

A. No, I couldn't because the house obstructed some part of it. I saw the stern of the vessel, yes.

Q. Did you observe the damage done to your boat after the collision?                      A. Yes, I did.

Q. Tell the Court what damage was done to your boat.

A. The stem was split from top all the way down below the water line. When we hit it split it wide open,

(Testimony of Jack Olsen)

and the stem bent the iron part of the stem here. It was bent out this way. (Indicating)

Q. In other words, the iron point of the stem was bent to the right or starboard side? [83]

A. Yes, to the right; yes.

Mr. Lande: Cross-examine.

Just one more question.

Q. Did you form any estimate of the speed of the Gloria R during the time you saw her?

A. She practically went all the time at full speed.

Q. What does that mean?

A. A boat like that, with that power makes about between seven to eight knots.

Q. Did she slow down any time before the collision?

A. Not that I noticed.

Mr. Lande: That is all.

#### Cross-Examination

By Mr. Toner:

Q. Mr. Olsen, how far off was the Gloria R when you say her green light?

A. Well, it was pretty close.

Q. In feet?

A. I couldn't say. I wouldn't say in feet. It is impossible to judge.

Q. Was it five meet—

The Court: Was it as far away as the back wall of the room?

The Witness: No, it wasn't that far, I don't think. [84]

By Mr. Toner:

Q. It wasn't that far?

A. It was pretty close.



(Testimony of Jack Olsen)

Q. Was it half as far as the back wall?

A. Yes.

Q. It was about half as far as to the back wall?

A. Probably a little more than that.

Mr. Toner: Does the Court have any judicial notice to take as to how long the courtroom is here?

The Court: I have forgotten. I should say the courtroom is probably—

The Clerk: It is about 80 feet, I think.

The Court: No. From the witness stand back there to the first row of seats I would say is about 35 or 30 feet.

By Mr. Toner:

Q. Between 30 and 35 feet?                      A. Yes.

Q. That is where the Gloria R was when you saw the green light?                      A. That is right.

Q. And you had not seen the Gloria R before that between the time she was 300 yards away and the time she was 35 feet away, is that it?                      A. No.

Q. You didn't hear her at all then? You saw the red [85] light when she was 300 yards away?

A. Yes, just about. I couldn't say the distance exactly, you know.

Q. About 300 yards?

A. Yes. Sometimes the weather and the atmosphere makes it pretty hard to judge distance.

Q. How was the weather that night?

A. It was clear.

Q. Clear and calm?                      A. Yes.

Q. Was the moon out?

A. Yes, the moon was up, just about at the rim of the horizon.

(Testimony of Jack Olsen)

Q. Then you didn't see the Gloria R at all from the time she was 300 yards away until she was 35 feet away?

A. Just about.

Q. And during that time you were talking to somebody else? A. Yes.

Q. Who were you talking to?

A. I forgot who it was. I don't remember his name. It was the skiff man.

The Court: He was the skiff man?

The Witness: No, he was at the lines ready to let go of the skiff. [86]

The Court: He was holding the line on the skiff?

The Witness: Yes.

By Mr. Toner:

Q. What was the Gloria R doing when you saw her when she was 30 to 35 feet away?

A. She was coming right on our port side quite a ways off.

Q. She was going full ahead?

A. Yes, as far as I could see.

Q. Was she going straight across your bow?

A. That is what I noticed when I saw her red lights—what did you say?

Q. She was going straight across your bow when you saw her 35 feet away?

A. That was the green light.

Q. You saw her green light at that time?

A. Yes.

Q. And at that time she was going straight across your bow, her direction was headed across your bow?

A. She is bound to do that when you see the green light on the port side of your vessel.

(Testimony of Jack Olsen)

Q. I don't care whether she was bound to or not; was she actually doing that?

A. That is what she was doing.

Q. That is what she was doing? [87]

A. Yes, going across our bow.

Q. At that time the engine was in reverse, was it, your engine?

A. It was just about the time that they put the engine in reverse.

Q. It was just about the time what?

A. That they put the engine in reverse.

Q. Your boat continued forward?

A. Well, very slowly.

Q. How fast were you going before your engine was put in reverse?

A. She was going with the clutch in, I imagine, about a mile and a half, two miles.

Q. How long does it take to stop that forward motion of a boat when she is going one-half miles an hour and you give her full astern?

A. Give me the dimensions of the vessel.

Q. I didn't understand.

A. It depends on the dimensions of the vessel and the heft of the vessel.

Q. How long would it take the Bessemer to execute that maneuver?

A. Two knots, I think she will travel about, say, 45 yards.

Q. Forty-five yards in how long? [88]

A. Before she comes to a dead stop.

Q. How long a time would that take?

The Court: He said if going two knots an hour.

(Testimony of Jack Olsen)

Mr. Toner: He said it would go 45 yards.

The Court: Yes, if he was traveling at the rate of two knots an hour and he executed the maneuver she would travel 45 yards before she would come to a full stop. Then how long before you got her going back?

Mr. Toner: I think the full stop satisfies the particular situation here.

The Court: All right.

By Mr. Toner:

Q. How long a time would that take before she came to a full stop at two knots?

A. It may be three minutes, two to three minutes.

Q. Would you say that two knots was the speed of the Bessemer just before the collision?

A. No, I wouldn't say exactly because I would have to judge that.

Q. Would you say it was one and a half knots?

A. I would say around one and a half.

Q. How long a distance would the Bessemer coast forward at one and a half knots?

A. Before she comes to a dead stop?

Q. Before she comes to a dead stop with her engines [89] running full astern.

A. Approximately 100 feet or so.

Q. One hundred feet?

A. Yes; probably a little more.

Q. Or a little more? A. Yes.

Q. How long does it take to get the Bessemer—strike that.

How long would it take the Bessemer that night to go from slow ahead to full astern?

A. What do you mean, the motion of the boat?



(Testimony of Jack Olsen)

Q. In time, from the time that the man at the controls released the clutch and turned the wheel until the time the engine went full astern?

A. That would take approximately half a minute.

Q. Did you hear any whistle blown on the Bessemer?

A. No.

Q. No whistle?                      A. No.

Q. How big a school of fish was this in feet, or area?

A. I couldn't say because I just come up from the engine room and I didn't see the whole school.

Q. But you thought it was a pretty good school?

A. I did by listening to the sound of the flips.

Q. But you couldn't see the school? [90]

A. No.

Q. And you didn't see the school?

A. No, but I heard it.

Q. You heard the school?                      A. Yes.

Q. Can you tell me which is the customary direction that a fishing boat circles a school, do they circle clockwise or counter-clockwise?

A. It just depends on which way the school moves.

Q. What is the custom?

A. There is no custom to it.

Q. No custom at all?

A. It is in either direction that the school of fish travels.

Q. You heard Tony Di Leva here say that the fishermen usually circle counter-clockwise.

A. When they are setting the net, yes, you go to the left.

(Testimony of Jack Olsen)

Q. They go to the left?

A. Yes, and set the net.

Q. They usually go to the left? A. Yes.

Mr. Lande: When they are setting the net.

By Mr. Toner:

Q. When they are setting the net? [91]

A. Yes.

Q. But it didn't make any difference either way when they are circling the school? A. No.

Q. Do they also go to the left when they set the net?

A. As a general rule they do. Sometimes they set to the right but it is very seldom.

Q. Why do they set to the left?

A. All the working gear is on the left side of the ship.

Q. And it is more convenient for a purse seiner to circle to the left? A. Yes.

Q. And that is the reason they circle to the left?

A. Yes.

Q. When a fishing boat is on fish, what is the duty of the mastman?

A. Well, he sets the gear, he lets you know when to let go the skiff and he watches the fish, follows the fish and directs the wheelman which way to turn.

Q. In order to stay on the school of fish?

A. Yes.

Q. And in order to get in a position where he can set the net and catch the fish? A. That is right. [92]

Q. What is the duty of the wheelsman?

A. The wheelsman, he has got to do what the mastman tells him to do.

(Testimony of Jack Olsen)

Q. What is the duty of the lookout on top of the pilot house?

A. The lookout—you always have one or two or three men to look for the fish. They all help to look for the fish whenever you are on a fishing boat.

Q. Was there anybody on the Bessemer whose job it was to look out for other vessels?

A. Well, I couldn't answer that.

Q. Do you know or don't you?

A. No, I don't know.

Q. Everybody that was on the pilot house, he had the job to look for fish?

A. I wasn't up there. I couldn't tell you who was up there.

Mr. Lande: I object to this line of questioning on the ground that this man is the engineer, not the captain or navigator of the vessel.

The Court: He is just asking who was there. If he doesn't know, he can say so.

The Witness: I said I don't.

The Court: He said he doesn't know.

Mr. Toner: That is all. [93]

The Court: Is that all?

Mr. Lande: Nothing further.

(Witness excused.)

The Court: We will recess until 2:00 o'clock. Are you resting now?

Mr. Lande: With the exception of the introduction of some documentary evidence that we have.

The Court: Recess until 2:00 o'clock.

(Whereupon, at 12:10 o'clock p. m., a recess was taken until 2:00 o'clock p. m. of the same date.) [94]

Los Angeles, California; October 30, 1947;

2:00 o'clock P. M.

The Court: Ex parte?

The Clerk: No ex parte, your Honor. Further trial.

Mr. Lande: I would like to introduce this as Libelant's exhibit next in order.

The Court: No. 2. Admitted.

(The document referred to was received in evidence and marked Libelant's Exhibit No. 2.)

The Court: Are you offering No. 1 in evidence?

Mr. Toner: There is no objection.

Mr. Lande: I am not offering No. 1 in evidence, your Honor.

I would like to offer next in evidence a letter from the California State Fisheries Laboratory, giving the deliveries of fish, sardines, between October 4 and 13, 1944; total amount of deliveries and the number of boats; also what our boat caught during that month.

Then attached to that are the daily deliveries of the Bessemer during October, November and December.

Mr. Toner will stipulate, I believe, that if an official of the State Fish and Game were called he would so testify.

The Court: In other words, he will waive foundation?

Mr. Toner: Yes. I will stipulate that these are taken from official records and that if called the representative [95] of the State Fish and Game Commission would so testify.

However, I would like to object to the entry of these exhibits on the ground that the exhibits are matters not



properly before the Court at this time inasmuch as this hearing should be on the issue of liability only.

The Court: Objection overruled. Admitted in evidence.

The Clerk: No. 3.

(The document referred to was received in evidence and marked Libelant's Exhibit No. 3.)

[LIBELANTS' EXHIBIT NO. 3]

[Crest]

State of California  
Department of Natural Resources  
Division of Fish and Game

CALIFORNIA STATE FISHERIES LABORATORY  
Terminal Island, California

May 14, 1946

To Whom It May Concern:

The official records of the California Division of Fish and Game show that 66,389,680 pounds of sardines were delivered in the Los Angeles area between October 4-13, 1944, both dates inclusive.

The total deliveries in the Los Angeles area by months were:

<u>Total Deliveries</u>	<u>Pounds</u>	<u>No. of Boats</u>
October 1944	149,347,983	89
November 1944	56,127,307	89
December 1944	85,481,112	92

(Libelants' Exhibit No. 3)

The seine boat Bessemer Fish and Game No. 2097 delivered poundages as follows:

October	1944	896,850
November	1944	1,047,450
December	1944	895,569

Very truly yours,

Frances N. Clark  
 Frances N. Clark, Chief  
 Bureau of Marine Fisheries

FNC:ras

# DAILY DELIVERIES OF BESSEMER 1944

<u>October</u>	<u>November</u>
14..... 60,250	8..... 128,500
16..... 156,500	9..... 130,000
17..... 32,500	10..... 84,200
18..... 16,800	11..... 1,000
19..... 80,000	
21..... 186,300	15..... 28,500
23..... 41,200	
24..... 96,300	16..... 80,000
25..... 30,000	17..... 81,250
27..... 87,000	20..... 59,000
28..... 110,000	21..... 68,000
	24..... 88,500
896,850	25..... 168,500

1,047,450

~~10,474,450~~

(Libelants' Exhibit No. 3)

		<u>December</u>	
5.....	191,500	14.....	54,500
6.....	20,500	15.....	27,700
7.....	82,500		[Written] 662,425
8.....	148,500	18.....	85,500
9.....	6,875	19.....	144
	68,250		14,500
	13,500	20.....	23,000
12.....	38,600	21.....	95,000
13.....	10,000	22.....	15,000
	[Written] 580,225		
			895,569

No. 4630-BH adm. Libs.' Exhibit No. 1. Filed May 16, 1946. Edmund L. Smith, Clerk; by M. E. W., Deputy Clerk.

Case No. 4630-PH. Di Leva vs. Van Camp. Lib. Exhibit No. 3. Date Oct. 30, 1947. No. 3 Identification. Date Oct. 30, 1947. No. 3 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk.

The Court: Let me see, in the respondents' answer to the fifth amended complaint, was there an admission that the parties named were employees or were in the service of the vessel?

Mr. Toner: Yes.

The Court: They were admitted to be employees of Van Camp Sea Food?

Mr. Toner: Yes. They are admitted to be employees of the Van Camp Sea Food Company.

The Court: And under your opening statement they are—what did you call them—“grossly” employees?

Mr. Lande: Grossly speaking, they are employees. I will go into that matter when we go into the argument. I would say commonly speaking, they are employees.

The Court: Commonly speaking they are employees?

Mr. Lande: Yes. [96]

The Court: Is there an allegation here that they were each to get one share of the lay?

Mr. Lande: Yes, your Honor.

The Court: Very well. Proceed.

Mr. Toner: There is the further statement in the answer that both vessels were operated under identical terms.

The Court: That is not up to him to prove.

Mr. Lande: We rest, your Honor.

The Court: The libelant rests.

Mr. Toner: If the Court please, I should like at this time to move to dismiss as to the respondent Gennaro Di Leva on the ground that no evidence has been introduced that in any way connects him with the case.

The Court: No, his name has not been mentioned by any of the witnesses.

Do you oppose the motion?

Mr. Lande: No, your Honor.

The Court: Motion granted.

Mr. Lande: May I say something on that score?

The Court: You have already said no.

Mr. Lande: Only this, that I make that statement upon the assumption that the respondent's position is not to be changed, to wit, that the crew of the Gloria R were



employees of Van Camp Sea Food. So under that situation it doesn't make any difference who the individual employees were. If [97] Van Camp wants to dismiss as to their employees, that is up to them. We are seeking to hold Van Camp Sea Food on the tort libel.

The Court: I have to consider the motion on the basis of the evidence before me and the admissions in the pleadings. There is no admission in the pleadings that Gennaro Di Leva was a separate charterer of the boat Gloria R, and there has been no testimony at all that has so much as mentioned his name. The motion is granted.

Mr. Toner: I will call Anthony Di Leva.

The Court: This is the other Anthony Di Leva?

Mr. Toner: This is the Anthony on the Gloria R.

# ANTHONY DI LEVA,

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Anthony Di Leva.

The Clerk: Your address?

The Witness: 660 Ninth Street, San Pedro.

The Court: You are not the same Anthony Di Leva who was sworn and testified this morning?

The Witness: No, sir. [98]

## Direct Examination

By Mr. Toner:

Q. Tony, how long have you been going to sea fishing?

A. Oh, I graduated from school in '41 and I started going regular since '41 to sea fishing, but in between

(Testimony of Anthony Di Leva)

that since I was 15 I was going in the summer months off and on fishing all the time.

Q. Were you fishing with your father?

A. Yes, sir.

The Court: What is your father's name, the same as the other Di Leva's name?

The Witness: No, Gennaro Di Leva.

By Mr. Toner:

Q. Tony, on October 4, 1944 you were the skipper of the Gloria R?

A. That is right, master, signed on as master of the Gloria R, and skipper.

Q. And in the evening of October 4th your vessel was in a collision with the Bessemer, is that correct?

A. Yes.

Q. Now at the time and shortly before the collision where were you on the Gloria R?

A. At the time of the collision—before I was on the mast. I was the mastman.

Q. You were the mastman? [99]

A. Yes, looking for fish.

Q. The mastman stands in the crow's nest?

A. The crow's nest. I will point it out. Right here.  
(Indicating)

Mr. Toner: Let the record show the witness is pointing to the model.

Q. And what is the duty of the mastman?

A. The mastman is to be always on the alert, looking for fish, and when you do come on fish you are to tell the wheelsman which way to go on the fish.

Q. What time did you start fishing on October 4th?

A. About 7:00 o'clock in the evening we start looking for fish.

(Testimony of Anthony Di Leva)

Q. What time was the collision?

A. It must have occurred about 9:30. That is what I can figure by now. It happened about three years ago.

Q. Approximately 9:30? A. Yes.

Q. And what did you do—where was the boat from 7:00 until 9:30?

A. We were proceeding from—well, we call it the bank there—we were outside of San Pedro. There is a bank there. We looked around there for a while and then we headed toward the east end of Catalina looking for fish.

Q. And you got to the east end of Catalina about when? [100]

A. Oh, I would say about 9:00 o'clock, something like that.

Q. Around 9:00 o'clock? A. Yes.

Q. Did you look around there?

A. Yes, we looked around there. We didn't see anything.

Q. Then what did you decide to do?

A. We started to head back towards San Pedro in a westerly direction there.

Q. In what direction?

A. A westerly direction towards San Pedro. We were coming from the east end of Catalina there. We didn't decide on going home yet, we just headed that way.

Q. You headed in a westerly direction?

A. Yes.

Q. Then what did you do? When did you decide to go home?

A. We looked around for fish there and we went towards the east end. We didn't find anything so we

(Testimony of Anthony Di Leva)

came back in the direction we were going, in a westerly direction, and we were headed on our way home and all of a sudden we were hit on the starboard side.

Q. What direction did you put your boat in when you headed for home? [101]

A. You put them in a northwesterly direction heading for San Pedro.

Q. That is on a direct line from the east end of the Island to San Pedro? A. Just about.

Q. That is the direction you headed your boat?

A. Yes.

Q. Did you see any other boats around there at that time?

A. When we approached the Island we seen the Bessemer. We seen them over there.

Q. You saw a light from the Bessemer?

A. Yes, we seen his green running light. That is all we saw.

Q. You saw his green running light?

A. That is right. His bow was in an easterly direction.

Q. Did you at any time see the red running light of the Bessemer?

A. No, sir. The only time we seen his red light was when we collided, when he come in and hit us.

Q. At what distance was the Bessemer when you saw this green light? A. At first?

Q. Yes. [102]

A. When we come to the Island?

Q. Yes.

A. I would say we were about a mile away from him.



(Testimony of Anthony Di Leva)

Q. You saw the green light from about a mile away?

A. Yes.

Q. And you proceeded on your way to San Pedro?

A. No, we come to the Island. We proceeded towards the east end looking for fish.

Q. Supposing you go down here to the blackboard and draw a similar diagram to the diagram that has been drawn by the libelant.

If the Court please, may I mark this libelant's?

The Court: That is Exhibit No. 2. Yours will be Exhibit A.

By Mr. Toner:

Q. Now we are using the red crayon for the Gloria R and the blue crayon for the Bessemer. Will you draw in the island roughly about the same size as the libelant has drawn it, and put an "N" to indicate north?

A. (Drawing on blackboard)

Q. Now will you point out the approximate position of the Gloria R when you decided to go home?

A. We did not have no say-so about going home, we just headed our bow in a westerly direction.

Q. When you decided to head toward San Pedro, about [103] where were you?

A. It would be better if I draw how we approached the island first.

Q. Surely.

A. We were coming up from this direction here, we headed towards the east end, and we got down here. (Indicating)

Q. Mark that a little heavier.

A. When we approached pretty close to the power plant down there, as soon as we got down there we didn't

(Testimony of Anthony Di Leva)

see any signs of fish so we swung around and headed back in this same direction. (Indicating)

Q. Then where was the Gloria R when you saw the Bessemer's green light?

A. When we first seen the Bessemer, it seemed like he was in that sort of a direction, in an easterly direction. (Drawing on blackboard)

Q. Would you draw in the contour of the boat a little better—make it sort of a—that is fine.

A. (Drawing on blackboard)

Q. And mark that position.

The Court: Where were you?

The Witness: At the time we first seen them?

The Court: When you first saw the Bessemer. Just mark it with a cross. [104]

The Witness: We were about right here because we seen his green light there. (Indicating)

The Court: Mark that position No. 1.

The Witness: (Drawing on blackboard)

By Mr. Toner:

Q. When you were down at the bottom of that chart and turned in the direction towards San Pedro, mark that position No. 2. A. Right down here about?

Q. Yes.

A. (Drawing on blackboard)

The Court: Where was the Bessemer then?

The Witness: To us he seemed like he was always in the same position there. All we seen was his green light. That was all we seen of him.

(Testimony of Anthony Di Leva)

By Mr. Toner:

Q. Just describe and draw a line indicating your course as you proceeded.

A. As we proceeded?

Q. Yes.

A. We were proceeding outwards here. (Indicating)

Q. Now when you approached the Bessemer, did the Bessemer make any turn or change in course?

A. Well, the only time we noticed that he turned is when he was so close that we had no chance to turn at all and [105] we were about—I would say we were about right here.

The Court: Mark that No. 3.

The Witness: (Drawing on blackboard)

The Court: Where was the Bessemer then?

The Witness: The Bessemer was always in that sort of a direction; it seemed like he was swinging toward us.

By Mr. Toner:

Q. Will you draw in in blue the course of the Bessemer and what did the Bessemer do and which way did it go?

A. He sort of swung along like this here—this should be a little bigger here. (Drawing on blackboard)

Q. How far off were you when the Bessemer made the turn that you had last described?

A. I would say it wasn't more than a hundred feet. He was pretty close to us.

Q. What did you do at the time when he turned toward you?

A. We were proceeding on a course there, and we figured, well, since he was heading in an easterly direction there that we would clear his stern and proceed right

(Testimony of Anthony Di Leva)

on our course there. Instead, all of a sudden, we see both of his running lights red and green right on us amidship, and we had nothing to do but keep on going.

Q. What did you do then?

A. We had to just keep on going. We sort of swung a [106] little and we seen we were so close to avoid the accident, but we couldn't avoid no accident.

Q. How far away was the Bessemer from the Gloria R when you saw both running lights?

A. Oh, I would say about 30, 40 feet. They were pretty close to each other.

Q. Did the Bessemer have any red light on the mast?

A. No, it had no red light on the mast.

Q. Before I go into that, what part of the Bessemer and what part of the Gloria R came into being with each other?

A. Well, the Bessemer, he hit us with his bow right where the rigging is, right amidship on the starboard side. We were proceeding out in a westerly direction, he swung around and hit us right amidship, right where the rigging is. That is where the smash was on the Gloria R.

The Court: Did you see both red and green lights at the time of the smash?

The Witness: Oh, yes. I was on the mast. I could see the boat coming right at me. It hit me right square in the rigging there.

By. Mr. Toner:

Q. Are you familiar with the custom in the San Pedro area with reference to red lights on the mast?

A. I am.



(Testimony of Anthony Di Leva)

Q. What does the red light on the map indicate? [107]

A. Well, when you put your red light on you are showing to the other boats, if there is any boat around, that you are on fish. That red light is sort of a warning that that boat is to stand clear of you, in a radius which your net would cover. You put that on before you set. We always do and I think there is a lot of boats that do, and I think that is the proper procedure, not when you lay your net in. When your circle around the fish, you see it is a proper school to set on, you are going to make a haul, you put your red light on.

Q. What does that tell to the other fishermen?

A. If there is other boats approaching it is to show that you are on fish.

Q. What does it tell you?

A. To stay away, stand clear of them, he is going to lay his net out.

Q. Is that common practice in the San Pedro area?

A. I see that going on every night when we are fishing.

Q. How fast was the Bessemer going before the collision?

A. I couldn't say. I wasn't on the Bessemer. But I don't think he was going too fast.

Q. About how fast in miles per hour, about?

A. He must have been doing at least two knots.

Q. How fast was your vessel going? [108]

A. About eight.

Q. Could you have cleared the stern of the Bessemer had the Bessemer not made this turn?

A. We could have cleared them easily.

(Testimony of Anthony Di Leva)

Q. About how many feet?

A. Oh, a good 50 feet, cleared his stern, we could have passed right off his stern.

Q. Are you familiar with the custom with reference to the direction a fishing boat circles fish?

A. Yes, I am.

Q. What is the custom?

A. We circle counter-clockwise, always towards your port. Very seldom do you circle it clockwise.

Q. What is the reason for circling counter-clockwise?

A. Because that is the way you lay your net out. All your gear is on that side of the boat. You lay it around to your port side, you swing always port.

Q. How many circles around the school of fish is usually made?

Mr. Lande: I object to that, your Honor, no foundation laid for such a thing that there is a usual number of circles to be made around a school of fish. It assumes a fact not in evidence.

The Court: It would be very interesting about fish if there was any usual number of time to go around them, but I do not know. Maybe there is. Objection overruled. [109]

The Witness: You can go around as many times as you want.

The Court: The long and short of it is that you circle until you decide it is a good place to lay your net and then if you do you lay it?

The Witness: That is right.

The Court: If you do not, you circle it some more until you find out what is there?

The Witness: That is right.

(Testimony of Anthony Di Leva)

By Mr. Toner:

Q. There is another purpose for circling a school of fish?

A. Sometimes the fish is spread apart and you circle them to try to bunch them up together.

Q. Tony, when you came up there and expected to pass the Bessemer, did you see any schools of fish?

A. No, we didn't see any fish at all. That is why we were headed back out on the way home.

Q. Did you see any school of fish in the vicinity of the Bessemer?

A. We didn't see any. We thought he was just lying adrift with his bow in an easterly direction. He had no red light on saying he was on fish.

The Court: Did you see his skiff out?

The Witness: His skiff? [110]

The Court: Yes.

The Witness: All the boats were running around. We have our skiff hanging on the stern.

The Court: Did you see his skiff on the side?

The Witness: I wasn't paying much attention. I didn't see his skiff because we were looking for fish.

By Mr. Toner:

Q. When you are looking for fish you have the skiff ready to lay the net?

A. Oh, yes. That is put in the water before you even start looking for fish.

Mr. Toner: I think that is all.

The Court: Cross-examine.

(Testimony of Anthony Di Leva)

Cross-Examination

By Mr. Lande:

Q. Tony, you say you saw the Bessemer just lying there and you thought she was just drifting, is that right?

A. That is what she seemed to us. She was always in one position with her bow in an easterly direction.

Q. Now, Tony, isn't it a fact that you saw the Bessemer circling around the fish there?

A. I never said I seen the Bessemer circling around fish.

Q. Do you recall your former trial in this case on May 16, 1946? [111]

Mr. Toner: What page, counsel?

Mr. Lande: Page 47.

Q. I call you attention to that page and line 16.

The Court: Read it to yourself. Then he will ask you questions.

By Mr. Lande:

Q. You testified at that time as follows:

"Well, he was circling around the fish here \* \* \*"

Did you not so testify?

A. That happened three years ago on the stand and I can't remember that far. Here it is three years later.

The Court: Just a moment. Did you or did you not so testify?

Mr. Toner: Just a moment. May we have the full quotation read, including line 21, where he claims he was circling on fish?

The Court: Read the whole answer in the record.



(Testimony of Anthony Di Leva)

Mr. Lande: May we go back a little here then?

"The Court: Did you get fairly close to the Island?

"The Witness: Well, we come out here. The Bessemer claims he was circling around fish about here, a circle like that.

"The Court: What is that circle? [112]

"The Witness: He said he circled around the fish.

"Mr. Toner: I think we had better use the red crayon for the Gloria R and the blue crayon for the Bessemer.

"The Witness: We come out here close to the Island, towards the east end there and did not find anything, so we headed out. We kept on a course straight out to San Pedro here and we headed for San Pedro. This would be the Gloria R like that. Well, he was circling around the fish here and he was looking more to the east—his bow towards the east. We could only see his green light at all times. That is all we seen was a green light and the only light he could see of ours was our green light on this side because our red one would be over here. He claims he was circling on fish. When we are circling on fish the regulation, the way we do it, we put a light on warning the boats, a red light, and he had no red light on, so we kept on traveling straight out this way towards San Pedro and he says that later on he turned to his starboard.

"The Court: I don't care what he said; tell us what happened. [113]

(Testimony of Anthony Di Leva)

"The Witness: All right. So we kept going. We got out to about this here position, out here, and he kept running a little ways, circling on the fish. As soon as we get over here we seen this boat. He said he turned to the starboard. He turned to the starboard. We kept going a little ways. He says he threw it in reverse. We kept our same course without changing. The only time we changed our course was when the accident could not be avoided. We turned to the port. If he had turned port, too, it would have avoided the accident because us turning to port we would go that way and his turning to port he would go this way."

Q. You testified that way on the previous trial, did you not?

A. I guess that is right, if it is written in the book. It happened three years ago. I testified on the stand three years ago.

Q. Mr. Di Leva, you saw the Bessemer at all times that you were around the east end of Catalina Island, did you not?

A. We were on the east end of Catalina Island.

Q. And you saw the Bessemer at all times?

A. Not at all times. I was looking for fish. We swung around, and you would see them out there. All we noticed would be his green light. Always toward an easterly [114] direction he was headed.

Q. I will show you on page 48, lines 23 to 25, and ask you to read these lines.

A. (Examining transcript) I just said that, didn't I? We seen the Bessemer all the time.

The Court: What page is that, counsel?

(Testimony of Anthony Di Leva)

Mr. Lande: Page 48, your Honor, lines 23 to 25 inclusive. May I read it into the record?

The Court: Yes.

Mr. Lande: "The Court: But you saw the Bessemer at all times?

"The Witness: Yes, sir. We seen the Bessemer all the time."

The Court: Then on page 49, did you show him that also?

Mr. Lande: Yes. I would like to show him page 49 too.

Q. Will you read on page 49 down to line 14, lines 1 to 13 inclusive.

A. (Examining transcript)

Q. Do you remember so testifying, Mr. Di Leva?

A. I can't swear to that because, you see, that happened three years ago.

The Court: Did you so testify? Is that what you said at the previous trial?

The Witness: Yes, your Honor, because it is in the book there. [115]

Mr. Lande: May I read it? Reading from page 49:

"Q. By Mr. Toner: How large a circle was he making here around the fish?

"A. Well, the average circle. When you set around fish that is about the size there.

"Q. How big is that?

"A. Oh, about 240 fathoms.

"Q. That is how many feet?

"A. (No answer)

(Testimony of Anthony Di Leva)

“Q. About 1440 feet?

“A. While he was circling on the fish then he said he turned hard starboard—starboard would be leading to his right and that way he led right into us and he hit us right amidship.”

Q. Now, Mr. Di Leva, at the time you were along the east end of Catalina Island and you had come in a northwesterly direction, then you turned and was heading up towards San Pedro, and all that time you saw the Bessemer circling around that school of fish very slowly, didn't you?

A. Circling around the fish?

Q. Around the fish.

A. We were looking for fish. I was on the lookout looking for fish. Once in a while you would look over that way and see this boat, the Bessemer, see his green light always. He claims he was circling on fish. [116]

Q. He was proceeding very slowly, was he not?

A. To us he seemed like he was proceeding slowly, more like he was still though.

Q. When you came up to go home you could as well pass 300 or 400 yards to the west or half a mile to the west or a mile to the west of where the Bessemer was circling on the fish, could you not?

A. We didn't know the Bessemer was circling on the fish.

The Court: The question is, whether or not you could have taken a different course.

The Witness: We could have, but that was a proper way to head back home because from the position we came in.



(Testimony of Anthony Di Leva)

By Mr. Lande:

Q. But you knew that that course would bring you close to the Bessemer, did you not?

A. Oh, sure, we came in. We passed a mile away from it going out in that same direction and we would have cleared him by plenty of room. There were only tow boats there, you know.

Q. Now in relation to this alleged custom of putting on the red light at the time they are dropping the nets, or before they are dropping the nets, isn't it a fact that they also just as often put the red light on as they drop the net in the water and the net is in the water? [117]

A. Some do, some don't. It is a custom the way you work, but the proper procedure is before you lay out to warn the boat you are supposed to put your red light up.

Q. I didn't ask you what your opinion of the proper procedure was, I asked you what was usually and customarily done. Is it fair to say that it is usual and customary that it can be done either way?

A. No, I think the way we always done it, and the way I have always seen it, you put the red light up when you are on fish.

Q. Referring to your testimony on page 58, lines 5 to 9—

A. You are bringing facts to me, things I said three years ago when the trial was fresh in my memory. Now it is three years later.

(Testimony of Anthony Di Leva)

Q. Will you read lines 5 to 9, please, on page 58?

A. (Examining transcript)

Q. Did you so testify at that time?

A. It is written in the report. I guess I did.

Mr. Lande: May I read it into the record.

"The Court: Sometimes they put it on just before they drop the nets too, do they not?

"The Witness: Yes.

"The Court: They do it both ways?

"The Witness: Yes, that is right." [118]

Mr. Toner: May I have the following five lines read into the record too?

Mr. Lande: All right.

"The Court: The fact there was no red light would not indicate that the Bessemer was not going to drop its net?

"The Witness: He claims he was on fish. He seen we were there. Why didn't he warn us that he was on fish so we could stay away from him?

"The Court: Why didn't you stay away from him?

"The Witness: We did not know he was on fish.

"The Court: You saw him there and you saw the boat. You had the entire ocean there.

"The Witness: That is right. We were headed straight out north to San Pedro. We would clear him. We weren't going to hit him. We were going to pass the stern of him. He would have been laying like this and we pass on the stern of him going to San Pedro.

(Testimony of Anthony Di Leva)

"Q. By Mr. Lande: You could have just as well gone to San Pedro and passed a couple of hundred yards astern?

"A. We happened to be on that course and kept going on it. [119]

"Q. And you did not bother to move over to give him a wide berth, then, did you?

"A. Well, how do we know he is on fish?" Do you wish any more read?

Mr. Toner: The next question and answer.

Mr. Lande: All right.

"Q. You saw him circling, didn't you?

"A. No, we didn't. We just seen his green light.

"Q. Haven't you got your diagram there indicating that the Bessemer was circling?

"A. He claims that is what—he says—he claims he was circling on the fish. I did not say I seen him.

"Q. Well, you saw him some time before the collision, didn't you?

"A. Yes, we passed—we passed on the outside of him. We seen his green light just like he says here."

I have no further questions, your Honor.

Mr. Toner: I have no questions.

The Court: Step down.

(Witness excused.)

Mr. Toner: I would like to call Jacob Pugliese. [120]

JACOB PUGLIESE,

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Jacob Pugliese.

The Clerk: Will you spell your last name?

The Witness: P-u-g-l-i-e-s-e.

The Clerk: Your address?

The Witness: 635 West 17th Street.

The Clerk: Is that San Pedro?

The Witness: That is right.

The Clerk: Take the stand.

Direct Examination

By Mr. Toner:

Q. Mr. Pugliese, what is your occupation?

A. I am a fisherman.

Q. How long have you been a fisherman?

A. I have been fishing since 1936.

Q. Were you aboard the Gloria R on October 4, 1944?

A. I was.

Q. At the time they had a collision with the Bessemer?

A. I was.

Q. In what capacity were you on the Gloria R?

A. You mean my job? [121]

Q. Your job. What did you do?

A. I was just a deckhand.

Q. A fisherman? A. A fisherman.

Q. Are you familiar with fishermen's custom in San Pedro area with reference to the use of a mast light?

A. I am.



(Testimony of Jacob Pugliese)

Q. Will you describe the custom to the Court?

A. Well, usually when a boat finds fish he puts his red light on. I have seen boats run all night with a red light on a school of fish. Sometimes they find a school of tuna and stay on it four or five hours with a red light to keep warning the other boats to keep away from it.

Q. What does the presence of a red light on the mast of a fishing boat indicate?

A. It indicates either the boat has got its net in the water or he is going to lay out.

Q. Does it indicate anything to the other boats?

A. It is a warning for the other boats to keep away.

Q. When is the red light put on, did you say?

A. When you are going to set.

Q. Is there any custom in the San Pedro area with reference to the direction in which a circle is made around a school of fish?

A. Well, from the experience I have had, why we have [122] always turned counter-clockwise on fish.

Q. When you come up to a boat, would you normally expect that boat to circle a school of fish clockwise or counter-clockwise?

A. No, I guess it could happen, but it is not very ordinarily that they do. Always to the right. Usually when a skipper find a school of fish, when he finds it the first time, to get his position again he has to make one complete circle hard over, counter-clockwise, to bring him back to the same position again.

Q. You said a circle to the right. What did you mean?

A. I mean counter-clockwise.

(Testimony of Jacob Pugliese)

Q. So that he has actually got the bow of his boat going towards the port, or left?

A. That is right.

Q. Where were you on the Gloria R at the time of the collision?

A. I was on the forward end of the boat, the bow.

Q. What did you see as the Gloria R proceeded towards San Pedro?

A. Well, I was standing on the bow and we were running northerly just a little—I couldn't tell you exactly because I wasn't on the compass—but I figured about a northerly direction, and all I could see was the green light of the Bessemer. [123]

Q. What would that indicate to you?

A. That would indicate that he was running easterly.

Q. Was the green light moving or was it stationary?

A. It is hard to tell. According to the way they say they were running at a slow speed and I couldn't tell very well .

Q. Was it dark at the time?

A. It was dark. The moon was up though.

Q. Could you see the loom of the boat or the shape of the boat?

A. Just faintly.

Q. But you did see the green light?

A. Just the green light.

Q. That means you saw the right-hand side or star-board side of the boat?

A. That is right.

Q. And if you were going north that boat would necessarily be headed east?

A. That is right.

(Testimony of Jacob Pugliese)

Q. Did you at any time prior to the collision see the red light of the Bessemer?

A. No, at the beginning of the fight, when he got there I seen his red light but prior to the collision I didn't see no red light at all. The only red light I seen is when he hit us amidship. [124]

Q. Whereabouts on the Gloria R did the Bessemer hit?

A. Where did he hit the Gloria R?

Q. Yes.

A. Right amidship.

Q. Now pointing to this model, will you show the Court just the approximate position?

A. He hit us just a little aft of the stays. (Indicating)

Q. And the stays are the—

A. Guide lines from your mast to the sides.

Q. Did the Gloria R receive quite a jolt or was it a slight bump?

A. Well, I don't know. They say they were going about two miles an hour, but that boat it just about knocked me overboard. I was holding onto a rope when we hit.

Q. Was it a heavy blow?

A. I think it was a good hit that was going at least four to five knots. It just about capsized us.

Q. What did the Gloria R do after the collision?

A. He just slowed us down completely.

Q. Where did the Gloria R stop with reference to the vessel?

A. The way he hit us. He just stood right there and started arguing from there on. The boat didn't go away from that position. It just stood in exactly one position. [125]

(Testimony of Jacob Pugliese)

The Court: Still arguing?

The Witness: Still arguing.

By Mr. Toner:

Q. As you approached the area in which the Bessemer was prior to the collision, would you say that the Bessemer made a turn or did she continue going straight ahead?

A. Well, he made a semicircle turn, a half-circle.

Q. So that when you saw his green light he was going in an easterly direction?

A. That is right. Well, he could still be going westerly and still see his green light. You don't have to be going completely east.

Q. How would that happen?

A. Well, if we would be on the starboard side of him his green light would be facing west, and that is all we seen. We couldn't see his red light until he approached us headon. That is the only way we could have seen his red light.

Q. What did you see at the time he approached headon?

A. I could see both lights red and green.

Q. Did you at any time prior to the collision see both lights?

A. No, I did not. I couldn't see his lights.

Q. Why couldn't you see the red light?

A. Because he was making a complete circle. You know, your running lights, your green light and red lights, they [126] don't show back, they only show off a 10 degrees angle. That is not to confuse the other boats behind you. And we couldn't see his red light at all.



(Testimony of Jacob Pugliese)

Q. Will you point out on this model just about the approximate position that you were in?

A. You mean where I was standing?

Q. Where you were standing.

A. When I first seen the boat I was standing right here. (Indicating)

Q. Indicating a point a little forward of the—

A. Pilothouse.

Q. —pilothouse on the port side? A. Yes.

Q. Then where did you go?

A. Well, I figure I didn't want to be on the bow when we got hit, so I ran down here, and there was a line from our skiff, our line from the winch to the skiff, so I just held on because I seen everything right from there just facing me.

Q. Did you hear any whistle blown on the Gloria R?

A. He blew two whistles after we got hit.

Q. Are you sure that was after the collision?

A. After the collision.

Q. How long after the collision?

A. Just exactly after we hit him. I don't know if the [127] mast had anything to do with it, with a loose rigging to pull a line and shake it back and forth, I don't know, but we heard two whistles.

Q. Did you hear anybody hollering on the Bessemer?

A. I heard them hollering just before we hit.

Q. How long before you hit?

A. Oh, just a second before we hit.

Q. Just a second before you hit?

A. Well, it might have been a couple of seconds.

(Testimony of Jacob Pugliese)

Q. A couple of seconds at most?

A. It takes you a couple of seconds to think.

Q. At least it would be a couple of seconds that you heard hollering?

A. Yes.

Q. Do you know who it was who was hollering?

A. No, I couldn't tell. There was a bunch of them hollering.

Mr. Toner: I believe that is all.

The Court: Cross-examine.

### Cross-Examination

By Mr. Lande:

Q. Mr. Pugliese, did you see the Bessemer circling around a school of fish when you were off the east end of the Island?

A. I couldn't say he was circling a school of fish. I don't know if he was on fish or not. [128]

Q. You saw him?

A. I seen a boat.

Q. And it was going very slowly?

A. I couldn't tell. Nobody can estimate speed at night.

Q. How far away were you?

A. Well, I couldn't tell you exactly how far.

Q. Were you a mile, two miles away?

A. I would say less than a mile.

Q. And then your boat turned around and headed northwest towards San Pedro, is that right?

A. I didn't say that. The only thing I can recall, that I paid any attention to, is that we had our bow in a northerly direction.

Q. You headed your bow in a northerly direction?

A. That is right.

(Testimony of Jacob Pugliese)

Q. You saw the Bessemer ahead of you then?

A. I didn't see them ahead of us; I seen him on the starboard side of us.

Q. But you saw the vessel ahead of you, you say, on the starboard side?

A. He was not ahead of us. He was on an angle from us.

Q. Well, he was northerly of you then?

A. I wouldn't know. I would not say that. I would [129] say he would be easterly from me.

Q. He was northeasterly, in fact?

A. That is right.

Q. Then your vessel went from the position it was in right up to where he was?

A. Oh, no. I didn't say that. I said we had our course going one way, he made a semicircle.

Q. Did you change your course any?

A. No, we did not.

Q. Right before the collision didn't your vessel put hard to port?

A. No, we didn't hard to no place.

Q. Your vessel didn't turn hard to port prior to the impact?      A. How do you figure hard to port?

Q. I mean, turned hard to port.

A. We were on our course.

Q. Right before the two vessels came together, didn't you turn?

A. I couldn't tell you exactly that minute. I can't see the rudder turn.

Q. But you felt, or knew that your boat was turning?

A. I knew we were going to get hit.

Q. You knew your boat was turning?

A. I couldn't tell. [130]

(Testimony of Jacob Pugliese)

Q. Did you see the turn?

A. I did not see the turn.

Q. You don't know whether it turned or not?

A. I imagine it did but I couldn't tell. After he hit us it turned the whole boat around.

Q. You say you were on the port side?

A. That is right.

Q. And your vessel was hit extremely hard so that you almost fell over, is that right?

A. I didn't say I just about fell out. I wasn't on the bow when the boat got hit. I didn't say that. I was amid-ship.

Q. Didn't you tell us that the impact was such that you had a hard time keeping your feet?

A. That is right.

Q. What damage was done to your boat?

A. Not at all.

Q. As a matter of fact, just a guard-rail was hit?

A. As a matter of fact, the boat leaked before we got hit and never leaked after we got hit.

Q. Isn't a fact that your boat was not hit on the port side but was hit on the starboard side?

A. That is right.

Mr. Lande: That is all.

Mr. Toner: Just one question. [131]

#### Redirect Examination

By Mr. Toner:

Q. Jacob, you said that the force of the collision turned your boat around. Do you mean that the stern of your boat was pushed around towards the port side?

A. I would say that; yes.



(Testimony of Jacob Pugliese)

Q. In which direction were the two boats headed? Were they headed bow to stern and stern to bow after the collision?

A. No. After he hit us we were about at this angle (indicating) and he was just about straight dead on us. He didn't hit us square, he flushed us, he kind of side-swiped us, a hard sideswip, just pushed his whole bow stem off.

Q. Did you see any fish when you came up to the vicinity of the Bessemer?

A. No, we didn't see any fish at all. I was on the bow all night and didn't see a thing.

Q. Were there any fish there?

A. We didn't see any.

Mr. Toner: That is all.

The Court: Step down.

(Witness excused.)

Mr. Toner: I will call Mr. Gennaro Di Leva. [132]

GENNARO DI LEVA,

called as a witness by and on behalf of the respondents, having first been duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Gennaro Di Leva.

The Clerk: Your address?

The Witness: 660 West Ninth Street, San Pedro.

The Clerk: Take the stand.

Direct Examination

By Mr. Toner:

Q. Gennaro, what is your occupation?

A. Fisherman.

(Testimony of Gennaro Di Leva)

Q. How long have you been a fisherman?

A. Forty-three years.

Q. And you were one of the parties to this action before the judge ordered it dismissed against you?

A. I don't understand what you say.

Mr. Lande: That is a matter of record. We don't have to ask him for a legal statement.

Mr. Toner: I want to know if it is the same party.

Mr. Lande: So stipulated.

By Mr. Toner:

Q. Gennaro, are you familiar with the fishermen's custom in and around the San Pedro area?

A. Yes, sir. [133]

Q. And is there any custom with reference to the use of the red mast light?

A. All fish in a school of fish, you have got to have a red light on the mast, right in here. (Indicating)

Q. What does that mean.

A. That mean if I see other boat around you got to stay away.

Q. You mean it warns the other boats to keep away?

A. Yes, you have to stay away from them.

Q. When do you put that red light on?

A. When you see another boat around and you suppose when he hit the fish you put the red light on the mast, then the other boat stay away from you.

Q. Is that red light put on when you are on fish?

A. Yes.

Q. Does that indicate to other fishing boats in the neighborhood that you have a school of fish there?

A. Yes.

(Testimony of Gennaro Di Leva)

Q. And you want the others to stay away?

A. That is right.

Q. What is the customary direction that a fishing boat uses to circle a school of fish?

A. Well, sometimes you don't, sometimes you do. Sometimes you make one circle, maybe two more, when you see a school of fish. When you do you make half a circle and he [134] sets the net. There is no use to circle a dozen times. When you see a school of fish you know what direction to go.

Q. One more question. You weren't on board the Gloria R?

A. No, I was sick at home. I had an operation. I didn't know nothing about the Gloria R.

Mr. Toner: That is all.

Mr. Lande: No questions.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Toner: I call Nicola Curci.

### NICOLA CURCI,

called as a witness by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Nicola Curci.

The Clerk: Will you spell it?

The Witness: N-i-c-o-l-a, C-u-r-c-i.

The Clerk: Your address?

The Witness: 545 West Eighth Street.

(Testimony of Nicola Curci)

The Clerk: San Pedro?

The Witness: Yes.

The Clerk: Take the stand. [135]

Direct Examination

By Mr. Toner:

Q. Nick, what is your business or occupation?

A. I am a fisherman.

Q. How long have you been a fisherman?

A. About 15 years.

Q. Are you familiar with fishermen's customs with reference to the use of the mast light?

A. Yes. Before any boat—before you see fish you have, right away you see the fish, you have to have a red light on top of the mast.

Q. What does the red light indicate?

A. It mean the other boat has to move from you, you got to give distance on each other, you know.

Q. Were you a member of the crew of the Gloria R at the time of the collision with the Bessemer?

A. I was member; yes.

Q. What position on the boat did you have at the time of the collision?

A. I sat alongside the locker room.

Q. Where were you?

A. Up on here. (Indicating)

Q. On the cabin? A. Cabin.

The Court: On top of the cabin? [136]

The Witness: Yes.

By Mr. Toner:

Q. There are controls outside on the roof of the cabin? A. I was on the other side.



(Testimony of Nicola Curci)

Q. You were standing next to Biago? A. Yes.

Q. And Biago was at the wheel? A. Yes.

Q. What were you doing?

A. Just sitting down, you know, smoking.

Q. Were you looking for fish?

A. Looking for fish, that is all.

Q. You were the lookout?

A. Yes, looking for fish.

Q. Do you recall that Tony said that you got down to the east end of Catalina Island? A. Yes.

Q. Then what did you do?

A. The moon come up, Biago says we got to go home, and he said put north by a little bit west. We are going straight to Pedro.

Q. Then what happened?

A. And on the way up he seen a green light.

Q. How far off was the green light?

A. About one mile, about 200 yards, one mile, I don't [137] know. It is three years ago and I don't remember for sure.

The Court: 200 yards to a mile?

The Witness: 200 yards, maybe one mile. I don't know.

By Mr. Toner:

Q. You don't know how far off that green light was?

A. I think one mile.

Q. One mile? A. Yes.

Q. And where was it with reference to your boat? What angle was it on? Was it dead ahead or was it off the starboard bow or what?

A. What do you mean, starboard bow?

Q. What angle to your course did you see it?

(Testimony of Nicola Curci)

A. North by west a little bit. She is going to Pedro.

Mr. Vermille: We have an interpreter here.

The Court: Do you want an interpreter?

Mr. Toner: Yes.

The Court: Do you understand what is going on?

The Witness: I don't understand very much, just a little bit.

Mr. Toner: I would rather have an interpreter, if the Court please. I didn't realize he was having difficulty.

The Court: I think he understands. Go ahead if you want one. He will have to be sworn.

(At this point Mike Liddi was duly sworn by the Clerk [138] to translate from the English language into the Italian language and vice versa.)

The Court: This is the Italian language you are translating?

Mr. Liddi: I will do the best I can.

By Mr. Toner:

Q. What bearing to the course of the Gloria R was the green light that you saw?

The Interpreter: He says the distance?

The Court: No, the bearing.

The Witness: About 200 yards.

By Mr. Toner:

Q. What angle was the Gloria R's course to the direction in which the green light appeared?

A. When they had the green light?

Q. Let's get at it this way. Was the green light straight ahead of the Gloria R?

A. I see all the time the green light. That is all I see.

(Testimony of Nicola Curci)

Q. Was the green light to the left or to the right of the course of the Gloria R?

A. Left; this side. (Indicating)

The Court: That is the right side. Ask him if it was port or starboard. [139]

By Mr. Toner:

Q. Was the green light to the port or to the starboard from the Gloria R's course?

A. The green light of the Gloria R, when you go to Pedro it is on this side.

The Court: By "this side" indicating the starboard side.

By Mr. Toner:

Q. Did you ever see the red light of the Bessemer?

A. No, I never seen the red light. I see the red light when the boat was close.

Q. How far off was the Bessemer when you saw the red light?      A. Oh, pretty close.

Q. How close?

A. Oh, about, I don't know, 20 yards.

Q. Twenty yards?      A. Yes.

Q. What direction was the Bessemer going at that time?

A. I think it is going to Avalon, he is going straight to Avalon.

Q. Where was your boat hit?

A. This side, going to Pedro this side.

Mr. Toner: Indicating the starboard side.

The Court: Starboard amidship. [140]

Mr. Toner: Starboard amidships near the stays.

That is all.

Mr. Lande: No questions.

(Witness excused.)

The Court: Next witness.

Mr. Toner: I will call Biago Cummo.

The Court: We might have a short recess here.

(Short recess.)

Mr. Toner: If the Court please, with reference to the structure of these fishing boats, particularly the screens around the lights, I believe the Court can take judicial notice that the running lights are visible from dead ahead to two points abaft the beam.

I believe counsel would stipulate to that.

The Court: Is that right?

Mr. Lande: I really don't know, your Honor.

The Court: Where would two points abaft the beam be?

Mr. Toner: That is an angle of  $22\frac{1}{2}$  degrees. The beam is on a 90 degree angle. Two points abaft the beam is  $22\frac{1}{2}$  degrees. There are 32 points in the full 360 degree compass.

The Court: In other words, it is 20 degrees off the midline of the ship?

Mr. Toner: No, it is 20 degrees off athwartships.

Mr. Lande: There is a difference between degrees and points, counsel. [141]



Mr. Toner: Yes, I know. It is 22 points. The statute so provides, that the running lights shall be visible not further aft than two points abath the beam.

The Court: Where is the two points abaft the beam on the model?

Mr. Toner: That is 22 points. (Indicating)

The Court: Point out where that would be.

Mr. Toner: It is about this way. That is covered in the International Rules.

The Court: Very well. Then it is two points stern-wise?

Mr. Toner: That is correct.

The Court: From a 90 degree angle to the light?

Mr. Toner: That is right.

Mr. Lande: That is right.

Mr. Toner: And the green light is not visible to the port side of dead ahead and the red light is not visible to the starboard side of dead ahead, because the inboard screen is parallel to the fore and aft line of the vessel. That is likewise a statutory provision.

The Court: From dead ahead you can see both lights?

Mr. Toner: Yes, but you cannot see the green light to the port side of dead ahead and you cannot see the red light to starboard of dead ahead. In other words, when you see both lights—

The Court: That means you are dead ahead? [142]

Mr. Toner: Yes. And when you see one light it is to whichever side it may be.

The Court: I see.

Mr. Toner: I will call Biago Cummo.

BIAGO CUMMO,

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Biago Cummo.

The Clerk: Your address?

The Witness: 383 West Ninth Street.

The Clerk: San Pedro?

The Witness: Yes.

Mr. Toner: The interpreter has already been sworn.

The Court: Do you need an interpreter?

The Witness: Yes.

Direct Examination

By Mr. Toner:

Q. Biago, what is your business or occupation?

A. Fisherman.

Q. How long have you been a fisherman?

A. Since I was young fellow, since I was real young fellow. It is about 37, 38 years ago I have been fishing.

Q. Are you familiar with the fishermen's custom in [143] the San Pedro area with reference to the use of a red mast light?      A. Yes.

Q. Will you describe that custom?

A. The red light on the mast means when the boat has found the fish and it is ready to lay the net for the fish.

Q. What position did you have aboard the Gloria R at the time it was in collision with the Bessemer?

A. I was close to the wheel light. I was the wheelman.

(Testimony of Biago Cummo)

Q. Will you describe the collision and events preceding the collision with the Bessemer? A. Yes.

Q. Go ahead and describe in your own words what happened.

A. Before the accident we were going north, going towards San Pedro, a little further west.

Q. Then what happened?

A. And then we saw that green light that was going east.

Q. Then what happened?

A. And then I saw the red light and the green light. That is the time when they hit us.

Q. What did the boat that you saw do? What did the Bessemer do? [144] A. He hit us.

Q. Did he make any turns?

A. He hit us and then he tried to back out at the same time, when he hit us by hitting us the boat itself backed out.

Q. What direction was the Bessemer headed in when he hit you?

A. We were going north and they came around that way, as I said before, and they hit us right amidship.

The Court: Did he cut across the Gloria R's bow?

The Witness: Well, he was going east, as he turned he hit us amidship.

By Mr. Toner:

Q. Did the Bessemer cross your bow before the collision when he was going east?

A. By seeing the green light; I saw the green light. That was a sign that the boat itself was going east.

The Court: Did the Bessemer cross the bow of the Gloria R before the collision?

(Testimony of Biago Cummo)

The Witness: When we saw the green light it was ahead of us; it was going east ahead of us.

The Court: Can you tell us if he crossed the bow?

The Interpreter: I can only ask one question at a time, your Honor.

The Court: I would like to have him answer the question [145] yes or no as to whether or not the Bessemer crossed the bow of the Gloria R before the collision.

What did he say?

The Interpreter: He still insists that he saw the light, the green light, ahead of us. He says, I saw the green light ahead of us.

By Mr. Toner:

Q. What direction was the green light going when you saw it ahead of you?

A. The boat, the Bessemer, it was kind of facing the bow going east at the time I saw the green light before the collision.

The Court: When he first saw the green light on the Bessemer was it to his port or starboard side?

The Witness: The Bessemer was ahead of us.

Mr. Toner: I believe he said dead ahead.

The Interpreter: He says the right-hand side. It must have been the starboard side.

The Court: All right. Is that what he said, the right-hand side?

The Interpreter: That is what he said, sir.

The Court: All right.

Mr. Lande: Mr. Di Leva says that the witness says he saw the green light straight ahead of him, which would be going in this direction. He could be coming up



(Testimony of Biago Cummo)

from this [146] direction here. They were coming up in this direction.

The Court: I know, but we are talking about the port or starboard side of the boat. If you project the middle line of the boat, was the Bessemer on his port or starboard side. He saw it one side or the other.

Mr. Lande: Or straight ahead.

The Court: Or dead ahead.

Mr. Lande: For instance, if your Honor was up in the bow of the Gloria R then the Bessemer would be dead ahead of him right now.

The Court: If you were the Bessemer this would be right ahead.

Mr. Lande: Yes.

The Court: That would be the starboard side, would it not?

Mr. Lande: Yes.

Mr. Toner: May I have the witness demonstrate with these two pencils?

Q. Biago, this pencil is the Gloria R and this pencil represents the Bessemer. We will put this pencil in the direction that the Gloria R was proceeding. I hand you the red pencil which will represent the Bessemer. Now place the pencil representing the Bessemer where the Bessemer was when you first saw it.

The Court: Just lay it down there. [147]

The Witness: (Illustrating.)

By Mr. Toner:

Q. That is when you first saw the Bessemer?

A. Yes.

The Court: Is that in approximately the right position?

(Testimony of Biago Cummo)

The Witness: Yes.

The Court: Tell us what happened.

By Mr. Toner:

Q. What is the distance between the Gloria R and the Bessemer at that time?      A. About a mile.

Q. Now what happened?

A. He says he saw the green light. He thought it was going east. Then all of a sudden he saw the green light and red light and that is the time that it hit, by making the motion that he turned to the left this way. (Indicating)

Mr. Toner: That is all.

The Court: Cross-examine.

#### Cross-Examination

By Mr. Lande:

Q. The Bessemer was slowly circling around fish, was it not—I will withdraw that.

The Bessemer was slowly circling when you saw her green light?

A. He claimed at the time that he hit us— [148]

Q. I mean at the time he first saw it. At the time he saw this green light when he said it was out in this position.

A. He claims that he thought it was going regular speed.

Q. Did he watch the Bessemer as it turned to the right as he has shown us?

A. He says I saw the green light and then all of a sudden I saw the red light and we begin to yell and holler.

(Testimony of Biago Cummo)

Q. When you came up from the position where you saw the green light, you were going about eight knots an hour, is that right? A. Our regular speed.

Q. Your regular full speed. And you saw the Bessemer circling there or turning, did you turn your boat to the right so you wouldn't come so close to it?

A. He couldn't do it no more, he was too close.

Q. Before he came too close, when he was half a mile away—

The Court: A mile away he said.

Mr. Lande: A mile away.

The Witness: He said I couldn't turn any more. I was going straight ahead. I couldn't turn any more.

The Court: Ask him what he did when the Bessemer hit.

The Witness: We stopped and we went right close to see [149] what kind of damage we did.

The Court: What did you do when you saw the Bessemer was going to hit you?

The Witness: He says just didn't do anything.

The Court: Didn't do anything?

The Witness: No, sir.

The Court: You kept dead ahead?

The Witness: Yes.

The Court: Any more questions?

Mr. Lande: That is all.

Mr. Toner: No questions.

The Court: Step down.

(Witness excused.)

Mr. Toner: Mr. Gerstle, please.

FENTON K. GERSTLE,

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Fenton K. Gerstle; G-e-r-s-t-l-e.

The Clerk: Your address?

The Witness: 1207 Banning; Wilmington, California.

Direct Examination

By Mr. Toner:

Q. Mr. Gerstle, what is your business or occupation? [150]

A. I am paymaster or settlement clerk for the Van Camp Sea Food Company.

Q. How long have you been so employed?

A. About 10 years. I have been with the company 12 years, but the last 10 at this particular job.

Q. Are you familiar with both the Bessemer and the Gloria R?

A. I know the boats. The company owns the boats.

Q. The Van Camp Sea Food Company owns both boats?

A. Yes, sir.

Q. Were both boats operated on the same plan at the time of a collision between the two vessels on October 4, 1944?

Mr. Lande: Objected to as calling for a conclusion of the witness. Let's have the facts as to what the plan was.

Mr. Toner: I am coming to that.

The Witness: They are operated on a share basis, if that is what you mean.



(Testimony of Fenton K. Gerstle)

By Mr. Toner:

Q. Were they operated on the identical share basis?

A. That varies with the number of men in the crew from one boat as to the other boat. There may be a fluctuation in that.

Q. That is the only difference?

A. That would be the only difference; yes, sir. [151]

Q. Will you describe what the share plan means?

A. Well, we have so much an amount of money as catch for the period. From that is deducted the fuel and oil and dockage and cleaning, if there is any, and incidental things that are in the usual contracts.

The Court: Groceries?

The Witness: No, sir.

By Mr. Toner:

Q. Groceries are deducted later on?

A. That is personal.

Q. After those deductions are made in the amounts for which Van Camp have made payment, then what is done with that?

A. That is divided into the number of shares that happen to fit that particular situation.

Q. What was the number of shares that the Bessemer had at that time?

A. I didn't look it up but I believe it was probably  $5\frac{1}{4}$ , and the net probably took  $2\frac{1}{2}$ —pardon me—the net would take  $2\frac{1}{2}$ .

The Court: What was the total number of shares?

The Witness: I don't know. I don't remember the figures.

The Court: I thought it was stipulated that it was  $18\frac{3}{4}$ .

(Testimony of Fenton K. Gerstle)

The Witness: That is right, but that includes the crew. [152]

The Court: I understand. How is that divided,  $2\frac{1}{2}$  shares for the net, 12 shares for the men?

The Witness: If there were 12 men in that particular amount of fish; yes, sir.

The Court: There were 13.

The Witness: Whichever the case is.

The Court: And and extra  $\frac{1}{2}$  share for the master?

The Witness: That is right.

The Court: And  $2\frac{3}{4}$  for the boat?

The Witness: That is right.

By Mr. Toner:

Q. An extra half share that went to the master was taken out of the boat's share?

A. That is taken out of the company's take; yes, sir.

The Court: The boat's share?

By Mr. Toner:

Q. Do you mean by that the boat's share?

A. Yes, sir. The company gives that to him for supervision of the boat.

The Court: Was that same thing true of the Gloria R with regard to the precise number of shares, the same scheme?

The Witness: The same scheme; that is right.

By Mr. Toner:

Q. Now when were the groceries taken out of the share?

A. After that division is made, then it is taken out [153] of the individual's earnings.

(Testimony of Fenton K. Gerstle)

Q. The amounts expended for groceries are divided into the number of shares that the men get?

A. That is right. For a 12-man crew it is 12 shares for the groceries.

Q. On the theory that the men eat the groceries and the boat doesn't?

A. That is right.

Q. Who pays for the maintenance and upkeep of the boat?

A. The Van Camp Sea Food Company as owners.

Q. Is any portion of that expense borne by the fishermen?

A. No, sir.

Q. On either the Gloria R or the Bessemer?

A. No, sir.

Q. Who pays the social security tax?

A. Well, the Van Camp Sea Food Company. It is deducted from the crew, from the individual, but we make the return.

Q. Do you pay the employer's share of the social security?

A. The company does; yes, sir.

Q. Do you retain the withholding tax?

A. From the crew? [154] Q. Yes.

A. Yes, sir, until such time as we make our returns.

Q. And do you transmit the withholding tax as employer of the fishermen?

A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. Mr. Gerstle, I show you a tabulation that you made prior to the last time you testified in this case—

Mr. Lande: I will stipulate that that can go into evidence.

Mr. Toner: Very well.

(Testimony of Fenton K. Gerstle)

The Court: That will be Exhibit B.

Mr. Toner: As representing the amounts of money earned on board the Bessemer for October 1944, November 1944 and December 1944 respectively.

The Court: That will be one exhibit.

Mr. Toner: Very well.

Mr. Lande: So stipulated.

The Court: It is in evidence.

(The documents referred to was received in evidence and marked Respondent's Exhibit B.)

Mr. Toner: That is all.

Mr. Lande: No questions.

(Witness excused.) [155]

The Court: Next witness.

Mr. Toner: The respondent rests.

Mr. Lande: May I recall Nicola Curci for cross-examination?

The Court: Yes.

### NICOLA CURCI,

recalled as a witness by and in behalf of the respondent, having been previously duly sworn, was examined and testified as follows:

Mr. Lande: To save time, would you stipulate that the direct examination of Mr. Curci given on the previous trial may be read into the record?

Mr. Toner: What pages?

Mr. Lande: Pages 101 to 107.

Mr. Toner: I believe it will expedite matters if we stipulate that the Court may read those pages without



(Testimony of Nicola Curci)

the necessity of them being read into the record, with the same effect as if they were read into the record. It is just a matter of mechanics of the thing. If Mr. Lande prefers to have the entire examination read into the record, he may do so, but I don't see any necessity for reading eight pages at this time.

Mr. Lande: The reporter states it may be copied in later if necessary. In the meanwhile the Court can read it through very quickly. [156]

The Court: In other words, you offer this in evidence as part of the cross-examination of this witness?

Mr. Lande: Yes, your Honor

The Court: It is admitted in evidence, and in the event of an appeal it may be copied into the record. This will be Libelant's Exhibit No. 4.

(The testimony above referred to is, in words and figures, as follows, to wit:)

NICOLA CURCI,

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Nicola Curci.

Direct Examination

By Mr. Toner:

Q. Where do you live?                      A. Eighth Street.

Q. What is the address?                      A. 545.

Q. San Pedro?                      A. Yes.

Q. Were you on the Gloria R at the time of the collision on October 4, 1944?                      A. Yes. [157]

(Testimony of Nicola Curci)

Q. And where on the boat were you?

A. On the boat what?

Q. Where were you on the Gloria R?

A. Alongside Biago on the pilothouse.

Q. When you started toward San Pedro what course did you follow?

A. The moon came up early and the skipper says, "Not enough fish." He says, "We better go home," and he is going north by little bit west just to San Pedro.

Q. Did you see the lights of any other ship?

A. I see the green light about three-quarters of a mile out off of the Gloria.

Q. Ahead of the Gloria or to one side?

A. The other boat I see the green light—that is, the Bessemer.

Q. Was that ahead of the Gloria R?

A. Bessemer ahead of the Gloria R.

Q. You saw it about three-quarters of a mile away?

A. Yes.

Q. What direction was it going?

A. The Gloria R?

Q. The Bessemer.

A. He is going little bit, I think, east.

The Court: East?

Mr. Toner: Yes, a little bit east. [158]

Q. And the two ships—as the two fish boats approached what happened then?

A. What happened then? We going right to San Pedro and the Bessemer he come in—

Q. The Bessemer came into the Gloria, is that what you said?

The Interpreter: That is what he said.

(Testimony of Nicola Curci)

By Mr. Toner:

Q. The Bessemer came into the Gloria R?

A. Yes.

Q. And hit the Gloria R?

A. Hit the Gloria R.

Q. And was the Bessemer making a turn?

A. No, going straight.

Q. The Bessemer was going straight? A. Yes.

Q. And went into the Gloria R? A. Yes.

Q. Was the Bessemer on the fish?

A. Yes, he is on the fish.

Q. And was he making a turn on top of the fish?

A. He make one turn, see, on top of the fish. He make one turn on top of the fish. Maybe find no more fish and he started to run again.

Q. Now, what direction was the Bessemer headed in when [159] it collided with the Gloria R?

A. I don't understand what you mean.

Q. When the collision happened what direction was the Bessemer headed in, when the two boats came together?

A. Right through the kitchen and the mast.

The Court: The question was, what direction was the Bessemer traveling. And according to the witnesses here they are almost in accord on that. They said the Bessemer was headed in a westerly direction.

By Mr. Toner:

Q. Was the Bessemer headed west at the time of the collision? A. Yes.

Q. Now, did the Bessemer have any mast light on?

A. No.

(Testimony of Nicola Curci)

Q. What lights were on the Bessemer?

A. Just the green light.

Q. The running lights?

A. Yes, running lights—that is all.

Q. Green light on the starboard and red light on the port?

A. Yes.

The Court: I do not understand the significance of the red and green lights as well as you people; but assuming the Bessemer was headed in a westerly direction and the Gloria R [160] in a northwesterly direction, that is, going toward Catalina Island, which light would be visible from the south?

Mr. Toner: Which light of the Bessemer, your Honor?

The Court: Yes.

Mr. Lande: The left light or red light.

The Court: You are talking in a language that is rather difficult for me to follow.

Now, according to each of these diagrams the Bessemer was headed toward Catalina Island?

Mr. Lande: Yes, sir.

The Court: And the Gloria R was approaching her going in a northwesterly direction?

Mr. Toner: Yes.

The Court: Now, as they approached which side of the Bessemer would have the red light?

Mr. Lande: The left side or south side.

Mr. Toner: Red light on the left side and green light on the other side.

Q. Now, as the Bessemer was ahead of the Gloria R, if the Bessemer was ahead of the Gloria R, and in this position, if the Court please, the green light would



(Testimony of Nicola Curci)

be visible on this side and the red light would become visible only when she turned into that position.

The Court: I understand that part of it.

Mr. Toner: There is a catch phrase that identifies the [161] lights by this means—it says “red-left-port.”

The Court: I understand that but I cannot keep it in mind. But you may proceed.

By Mr. Toner:

Q. You are familiar with the San Pedro custom with reference to a masthead light?

A. San Pedro custom—masthead light? Well, when you are not on the fish—

Q. Just answer whether you are familiar or not. Do you know the custom? A. Yes, sir.

Q. What does the custom mean?

A. The custom—you have a red light on top of the mast. It means danger, you see, you better look out, you better go away.

Q. And when do you put on the masthead light?

A. Well, sometime you—when you are on top of the fish. Sometimes you may be on top of the fish and you run the boat about a half hour sometimes with it on.

Q. Was there any red light on the Bessemer?

A. No.

Mr. Toner: That is all.

The Court: Just a moment. Did you see a red light at any time on the Bessemer?

The Witness: No, sir. [162]

The Court: That is all. All you ever saw on the Bessemer was the green light?

The Witness: That is all.

(Testimony of Nicola Curci)

Cross-Examination

By Mr. Lande:

Q. Isn't it true it is also part of the custom just to put the red light on just as you lower the net?

A. That is the law. The law is you have got to have a red light on top of the mast.

Q. When the net is being lowered?

A. (No answer.)

The Court: Any further questions?

Mr. Lande: I am trying to think, your Honor, whether I have anything further.

Q. After you made your big turn around here and you came back to the Island and started out toward San Pedro, were you going home, is that right?

A. Yes.

Q. You were not circling for fish then, were you?

A. No.

Q. And you did see the Bessemer circle for fish, didn't you?

A. Yes, sir.

Q. What?

A. I see one time stop. I don't know find fish or not. [163]

Q. You could have just as well steered you boat a quarter or a half a mile from where the Bessemer was, couldn't you?

A. About three-quarters of a mile.

Q. And from that three-quarters of a mile you went up to where the Bessemer was, didn't you?

A. Went right through to San Pedro.

Q. And you went about eight knots an hour.

A. About seven or eight knots an hour.

Mr. Lande: That is all.

The Court: That is all.

The Court: Very well. I have finished it. Any further rebuttal?

Mr. Lande: No, your Honor. The libelant rests.

The Court: The libelant rests.

Mr. Toner: The respondent rests.

The Court: How must time will you want for argument?

Mr. Lande: I will waive opening argument.

The Court: On the question of the evidence here, I think the evidence shows that the fault lay in the Gloria R.

Mr. Toner: If the Court please, we have several situations in a case in admiralty, as the Court well knows. First of all, the Court can find the sole fault on one vessel, sole fault on the other vessel, or mutual fault. [164]

The Court: I think the custom here was either to put the light on when they were circling the fish or when they started to or to put it, as the witness says, "It is the law." I don't think he meant that there is any statute on it but when they dropped the net they had to have the light on. That is the custom.

Mr. Toner: That violation was on the part of the Bessemer.

The Court: I do not think there was any violation. They hadn't dropped their net.

Mr. Toner: I see.

The Court: And as far as the custom of circling, there is not direct testimony that they should have circled one way instead of the other. In fact, the law of common sense and reason would indicate that they might circle one way or the other according to the judgment of the

mastman as to which would be the best way to circle fish or find out where the fish were and which way they were going. So I do not think there is any violation on the part of the Bessemer as to the encircling movements. In other words, from listening to the testimony and the witnesses and considering all of the factors that go into the matter of weighing testimony, I am satisfied that the Gloria R was at fault and the Bessemer was not at fault.

Mr. Toner: I have this to suggest to the Court, and [165] that is that the testimony of the master of the Bessemer indicates that he did not blow the whistle, he did not do anything until the vessels were practically on each other, and that nothing was done. Now the law is that two vessels cannot get into that close proximity without there being fault on both parties.

The Court: Without there being fault? What if they did not know about it? What if they did not know that the ship is going to hit? His testimony was that he saw the vessel approaching and he went about his business, which he had a right to do, assuming that the Gloria R would avoid him, and the next thing he knew the Gloria R was where he couldn't be avoided, it wouldn't have done any good to blow the whistle.

Mr. Toner: We had the obligation, under the International Rules, to maintain our course in speed when we see the vessel. If we see the green light we are negligent if we do not maintain our course at that speed. There are any number of decisions on that point. As a matter of fact, the statute so holds. International Rule, I think it is 27 or 19 perhaps, requires us to hold course and speed. We had to hold course and speed. when we see a vessel going east and we are going north.



The Court: That is taking the testimony of your witnesses as true, that they saw the green light. But the testimony of the other side is that it was red to red. [166]

Mr. Toner: Yes, that is correct.

The Court: So it is impossible to believe both sides.

Mr. Toner: I appreciate that.

The Court: And it becomes a matter of judgment. And it is without any discredit to anybody particularly that I, as a judge, believe the libelant's witnesses and I believe from the testimony that the Gloria R was at fault.

Now as to your case of *Loe v. Goldstein*, I do not think that that is applicable in this instance.

Mr. Toner: That is applicable solely on the question of whether *Gennaro Di Leva* was a charterer or an employee.

The Court: That is out of the case. He is an employee. That question is out of the case, and the question is whether or not, under your theory of the case, these people cannot sue their employer.

Mr. Toner: That is correct. The case of *The Lydia* is the leading case on the subject.

The Court: *United States v. Laflin*?

Mr. Toner: *United States v. Laflin*.

The Court: I have read that.

Mr. Toner: The Ninth Circuit there said, at page 685:

"It is well settled by the decisions that in whaling voyages—"

And that is the same as here.

The Court: The same lay and share basis as this. [167]

Mr. Toner: The same lay and share basis as this.

“—the sailors who have a certain lay or share in the proceeds as wages are never regarded as partners with the owners, though they may participate in the profits of the voyage; and it is equally well settled that neither the officers nor members of the crew may join with the owners in a recovery of the proceeds of the voyage.”

Now in support of that proposition the Ninth Circuit has cited *Lewis v. Chadbourne*, *Grozier v. Atwood*, *Baxter vs. Rodman*, and has quoted very liberally from *Taber v. Jenny*. Those are old cases, it is true, but I think they are rejuvenated by the use by the Ninth Circuit in 1929 in *The Lydia* case.

The Court: The difficulty with this case and your theory is that the Ninth Circuit Court of Appeals did not entirely close the door on this kind of a suit in this case, because they say, at page 865:

“We find no difficulty in sustaining the trial court’s conclusion that the owner could bring the action as representing the crew, and that within the meaning of the statute the latter might ‘submit their claims’ through him, and might sue him for damages, if he neglected to prosecute the same.” [168]

Mr. Toner: That is correct.

The Court: And again quoting from *Taber v. Jenny* they adopt the doctrine:

“If the owners neglect to take proper means to obtain indemnity, they would be responsible to seamen for that neglect.”

Now your theory, if I understand it correctly, is that Van Camp Sea Food Company being the owner of both

of these boats, and being the employer of both of them, cannot sue itself.

Mr. Toner: That is correct.

The Court: And cannot be forced to sue itself.

Mr. Toner: That is correct.

The Court: I do not think that in admiralty, where equity principles are applied, that it was ever intended that the owner—an owner being an owner of two vessels and damaging a vessel such as this and resulting in injury and loss to the crewmen—that the equitable principles would foreclose entirely those crewmen from collecting whatever damages they have. I think this case is authority for that proposition because it says “if he neglected to prosecute the same.” If they “neglect to take proper means to obtain indemnity, they would be responsible to seamen for that neglect.”

The evidence here shows that they have not done anything. Of course they haven’t sued themselves but they have [169] paid the seamen either.

Mr. Toner: I do not think they have an obligation to sue themselves.

The Court: I do not think they have an obligation to sue themselves either—I think that would be a little ridiculous—but I cannot go along with your theory.

Mr. Toner: If the Court please, here we have a profit-sharing agreement in lieu of wages.

The Court: But they are employees.

Mr. Toner: They are employees, that is true. If I have an employee and I say to this employee, I will give you 10 per cent of my profits, or half of my profits, and I don’t have any profits, he doesn’t have to share in the losses. Now when Van Camp has a fishing boat col-

lision between two fishing boats there are no profits. They have operated those two fishing boats at a loss.

The Court: I still go back to the proposition that admiralty applies the principles of equity.

Mr. Toner: Yes, that is correct.

The Court: Equity is a court of conscience and a court of conscience certainly would not just because one owner happened to own two vessels preclude these people from recovering. If the Gloria R had been owned by the United States or Joe Doakes or John Brown or anybody else there would not be any doubt about their right to recover because, due to the [170] fault of the Gloria R, they have been prevented from earning, that is to say, catching and sharing in the lay of that ship which they would have otherwise done had there been no fault on the part of the Gloria R.

Mr. Toner: I appreciate the Court's attitude, but I don't necessarily agree with it.

The Court: There is no unusual distinction in not agreeing with me. I may be entirely wrong, but that is the way I see it. Therefore the question remains as to what is the measure of damages here. I have not calculated your figures that I have observed on the other exhibits. Is there any difference between your exhibits here and the figures in this letter from the Fish and Game Commission?

Mr. Toner: I don't think they are the same thing at all, if the Court please.

The Court: This shows the daily deliveries of the Bessemer for October, November and December 1944. And here are the earnings in money, is that right?

Mr. Toner: Yes. By the individual fishermen.



The Court: By the individual fishermen?

Mr. Toner: Yes.

The Court: There is no doubt but what the shares of the lay are agreed on here, I mean, that it was  $18\frac{3}{4}$  and each man got one, and the master got one and a fraction, whatever it is, so it is not necessary for me to make these calcula- [171] tions on the share of the lay. And it is also admitted that the price of sardines was \$22 a ton.

Mr. Toner: It was so stipulated.

The Court: So it seems to me the measure of damages here would be the number of tons of sardines that would have been caught during this period, multiplied by \$22, and then divided into the separate shares.

Now how would you arrive at that number of tons? I have taken some figures here and worked back and forth on them. In other words, taking October and November as average months, from October 14th until the end of November was a total of 45 days. Now while they did not fish every day, there is a total number of 45 days and a total quantity of fish of 1,047,450, plus 896,850, and 45 days into that total quantity of fish would have been an average, or was an average, of 43,206 pounds of fish caught each day. That is not a fishing day, that is a day.

Mr. Toner: That is 43,206?

The Court: Let me see here. (Making calculation) Yes. Say 43,200 pounds of fish a day during those months. Assume that during the eight days that the ship was laid up—

Mr. Lande: Nine days, your Honor.

The Court: The 3rd to the 13th?

Mr. Lande: From the 4th to the 13th inclusive.

Mr. Toner: Isn't there a Sunday in there? [172]

The Court: I have counted Sundays in this calculation.

Mr. Toner: Boats don't fish on Sunday.

The Court: I know, but what I have taken is every day from the 14th of October until the 30th of November, inclusive, and the total fish caught in that period, and instead of trying to say they fished this day and that day I just took the total number of days and average pounds of fish caught per day, and that gives a figure of 43,206.

Mr. Toner: The libelant, on page 4 of his libel, is asking for eight days.

Mr. Lande: That was eight actual days, but inasmuch as the Court is making this calculation, there is no question but what the boat was laid up from the night of the 4th to the 13th.

The Court: If you reduce this to just fishing days, counsel, if there are eight fishing days your average would be almost 50 per cent more. It would calculate on that basis then 81,000 pounds of fish.

Mr. Toner: That I don't follow. If you have four Sundays that they didn't fish—

The Court: They fished the 14th, 16th, 17th, 18th, 19th, 21st, and they skipped days in there up until the 28th.

Mr. Toner: Those are days in which they fish but they missed. Those should count to reduce the average. If this boat goes out on Wednesday night, October 21st, and doesn't [173] catch any fish, that should count.

The Court: They went out October 21st and caught 186,000 pounds of fish.

Mr. Toner: I am using that as an example. There are nights that they go out and don't catch any fish.

The Court: That is exactly what I have done here.

Mr. Toner: Fishing days are every day except Sunday, so that out of those 45 days there are six Sundays.

The Court: The way I have done is taken every day whether they went out and caught anything on those nights or whether it was Sunday. In other words, it seems to me that that would be the fairest way to take an average when you cannot tell whether they could have fished. So that gives a figure of 43,206 pounds of fish, and if there are nine days—

Mr. Lande: Your Honor, there were ten inclusive from the 4th to the 13th.

The Court: That is what I thought, that it was 10 days.

So taking 432,000 pounds of fish, divided by 2000 pounds per ton, that would make 216 tons, is that right?

Mr. Lande: 216 tons.

Mr. Toner: 216 tons.

The Court: Yes, 216 tons of fish, and at \$22 a ton as the admitted price, that would make \$4752. Then you would divide that by  $18\frac{3}{4}$ . [174]

Mr. Toner: I think the operating expenses come out of that first.

The Court: Yes. That is gross. Is there evidence here of what the average operating expense is?

Mr. Toner: There is evidence in there as to the operating expenses over that length of time.

The Court: What does it average?

Mr. Toner: I don't know. I haven't seen it.

The Court: I will let you fellows figure that out.

Mr. Toner: Before the Court gives a judgment, may I suggest that the Court look at the earnings of each man for the balance of the month of October? It is found that they lost eight days, eight fishing days, during October, and they fished 13 days during October. They made about \$500 and some odd dollars for the 13 days that they fished in October and this way they are going to get a good deal more than \$500.

The Court: Not a great deal more. I think this is the fairest way to fix the gross of all of the catch which has to be fixed before anything else.

In other words, my judgment will be that the gross value of the catch as damages will be \$4752, or 10 days at an average of 43,200 of fish a day, or a total of 216 tons at \$22 a ton.

Now as to the operating expenses, can you agree on that, counsel? [175]

Mr. Lande: Is Mr. Gerstle here yet?

Mr. Toner: He just left.

The Court: I think you probably can agree on that, don't you think?

Mr. Toner: Possibly.

Mr. Lande: Just a minute. Mr. Di Leva informs me that the last 15 days of the month they made the operating expenses that were on the boat while it was laid up. In other words, they still had to buy food, and so forth, on the boat.

Is that right?

Mr. Di Leva: No. The food we bought prior to the accident, and the oil and everything we paid for when



we made settlement at the end of the month and went fishing those 13 days.

The Court: That does not enter into it then. In other words, your operating expense has already been taken out of this. In other words, the average operating expenses per day from October 14th until November 30th inclusive, if you take your operating expenses for that total time and divide it by 45, so much per day, multiply that by 10 and deduct it from \$4752.

On these operating expenses, can you agree as to that? You are familiar with it. Then there will have to be deducted the withholding tax.

Mr. Lande: On a damage accident I submit that that is [176] not so.

Mr. Toner: The Ninth Circuit has said differently.

The Court: That is what I thought, but I believe I was reversed.

Mr. Toner: The Court may get some consolation out of the fact that we have a case in the Supreme Court, the Johnson case, in which that point will be discussed by the Supreme Court and the Court will ultimately be vindicated.

The Court: In other words, it is the law of the Circuit now, as I understand it, that the owner of the boat, in this instance the Van Camp Sea Food Company, deducts the withholding tax and the social security tax in a damage case. This is in lieu of wages. So that will have to be figured out. Do you think you can agree with counsel on that?

Mr. Toner: That is merely a matter of mathematics.

The Court: So that the \$4752 will be reduced by the operating expenses, which will be arrived at by taking the

total operating expenses for the 45 days from October 14th to November 30th inclusive, dividing it by 45 and multiplying it by the 10 days during which the boat was laid up, and subtracting that figure from \$4752, which will give the net figure to be divided by  $18\frac{3}{4}$ , as the uncontradicted testimony shows  $2\frac{1}{2}$  shares for the net, 12 shares for all of the men except the master,  $\frac{1}{2}$  share for the master, and  $2\frac{3}{4}$  shares for the boat, which will reduce the amount to be paid [177] by Van Camp Sea Food Company.

Is that clear?

Mr. Toner: Yes, your Honor.

The Court: Is that clear to you?

Mr. Lande: Yes, your Honor.

At this late date could I suggest another formula on this? I can't understand how it works out as small as it does if the Court's figures are right on it because I figure practically the same way and I get a result much higher.

The Court: My additions may have been wrong, but I was listening to the testimony and in between bits of testimony adding a column of figures.

Let us start over again. The total for October, according to this letter from the Fish and Game Commission, Exhibit B—

Mr. Toner: I think there is another much simpler method which I don't like to use, but it will simplify all this addition and subtraction.

You have on the exhibits that the Clerk now has the net moneys that these men made during the balance of October and the balance of November. They made \$500 in one month and about \$700 in the other month. You can divide that by 45.

Mr. Lande: These computations have already been made.

The Court: Why not give a judgment for the net figure? Then you do not have to make your calculations. [178]

Mr. Lande: That is right.

The Court: You will have to make your calculations anyhow because you have to make your return.

Mr. Lande: At least it will give us the amount of the judgment and then we will turn it over to Van Camp and they can figure out the different things.

The Court: I think it would be better to figure it on the other basis, of \$22 a ton.

We will start out with October, with a total of 896,850, November 1,047,450. Are you satisfied that those figures are correct? I have not totaled them.

Mr. Lande: They are correct, sir.

The Court: And it is 45 days inclusive, is that right?

Mr. Lande: Yes, sir.

The Court: You divide that by 45.

Mr. Toner: What was that figure, 1,000,000 what?

The Court: 1,944,300 pounds.

Mr. Lande: The October delivery was 896,850, November 1,474,450.

The Court: I have a figure of 1,047,450.

Mr. Lande: I must be in error.

The Court: I will check it again.

I still get 43,206, which is the figure I had before.

Mr. Toner: That is what I get.

Mr. Lande: Here is what we were thrown off on. There [179] is a dark of the moon in there, which throws you off for seven days.

The Court: That does not make any difference.

Mr. Lande: But the days they lost were fishing days, and you are averaging in some dark of the moon days when they were in for a solid week.

The Court: Out of 45 days you have a dark of the moon, do you not?

Mr. Lande: Yes, sir.

The Court: And you have a light of the moon?

Mr. Lande: Yes, sir.

The Court: Let us get a moon calendar. Who has a moon calendar for 1944?

The latter part of October was the light of the moon and the early part of November was the dark of the moon, good fishing days; then the light of the moon, and then the good fishing days started again.

Mr. Lande: From what it shows here, it shows from the 28th of October to the 8th of November it was the light of the moon and no fishing, a total of 10 days.

Mr. Toner: That is not correct. The light of the moon is two days either side of the full moon.

Mr. Di Leva: Three days.

The Court: Just a moment now.

We will carry this average on through December, down to [180] December 14th, and that will be 45 days plus—well, it ought to be December 15th—that will be 60 days. So we will divide it by 60 and that will get as



many lights and darks of the moon as you would otherwise. The moon is every 28 days, is it not?

Mr. Toner: Every  $29\frac{1}{4}$  days, to be exact.

I can make this suggestion to the Court: The Court can rid of this entire computation by referring it to a referee.

The Court: We can do it now in 20 minutes and it will take a referee two weeks.

Mr. Lande: Your Honor, may I interrupt and suggest something?

On the first sheet it shows, that is, the first sheet of the Fish and Game Commission's letter, that for the days October 4th to October 13th—

The Court: I cannot take what 89 boats show and take the average of the boats. It has to be based according to the Bessemer's capacity because I have no idea, and there is no evidence here, as to what the capacity of the other boats was.

I am taking the figure up to and inclusive of the 13th of December. That will give you exactly 60 days.

Mr. Lande: That hits us with two full moon periods, and that will drop the average out of proportion.

The Court: That is just three days short of two full [181] cycles.

Mr. Lande: On the 45 days we only get caught with one full moon so we are better off at the 45 days. I understand the Court wants to try to get the most equitable way you can in working it out here. But may I suggest this alternative: You have in October, November and December three darks, that is, when the vessel fished. Now you have the record of what they did on two complete darks, November and December. For October you have a record of what they did on half a dark. Can't we work out something from what the darks are there?

The Court: I think probably this is as good a way as any. I have added this other in and it still averages up, instead of 43,206 it is 42,080 something, so I think the first 45 days average is as good as any.

Mr. Toner: I have been making some computations here, if the Court please, and I find that in the balance of October one share was worth \$502, in all of the November one share was worth \$606.

The Court: That is net or gross?

Mr. Toner: That is one share to the men. That is money that goes to the men.

The Court: That is after the deductions?

Mr. Toner: That is after all operating deductions.

The Court: How can Van Camp Sea Food, the respondent in this case, calculate their withholding tax and their un- [182] employment tax if I say that their net is so much money, that is, after the deductions are paid?

Mr. Toner: That is before deducting the withholding tax.

Mr. Di Leva: That is after the pay. That is with the withholding tax, social security and all expenses out. That is pay.

The Court: I think this average figure, gentlemen, is about as equitable as you will find because I have taken the 60 days and it comes to 42,000 pounds of fish a day, and you add in a few more days and it brings it up to 42,500, and the 45 days gives you 43,206 pounds of fish per day.

Leveling off the odd figure and multiplying by 10 that would be 432,000 pounds of fish, and dividing that by tons would be 216 tons, and at \$22 a ton that would be \$4752. That is the figure that we talked about a while

ago. I think that is about as fair and equitable a way of calculating the gross amount of the lay as possible.

Now if you can agree on these other figures, all right. If not, I will have to settle them now.

Did you say you had an average expense there, total expense?

Mr. Toner: I am attempting to look for it. I don't see the fuel bills.

The Court: I do not see why you cannot figure the ex- [183] penses on the same basis that I figured this other, the total expense for the periods remaining in October and November, and multiply it by 10 and deducting the other figure.

Mr. Toner: The Court ran them until the end of November.

The Court: Forty-five days beginning October 14th until and inclusive of November 30th.

Mr. Lande: Of course we come right down to getting an average. The Court wants to know what an average would be if the vessel had gone out. I submit that of the 45-day period you should consider the days when she would have gone out. In other words, she actually only would have gone out during those 45 days at the very most 40 of those days, so therefore the catch that she would have gotten would not have been the figure for the 45 days. Your divisor is not 45, but 40.

The Court: That is all true, counsel, but the difficulty here is that you have not any exact measurement of damages anyhow. I cannot say, nor can anybody say, that if they had gone out that night and had not been damaged they would have caught 200 tons of fish or 10 tons of fish or no fish, as they did on some other nights. So it is just a matter of using judgment on what is the

fairest average. It seems to me that if I take too short a time it might be unfair to either side. If I take the average time it seems [184] to me to be the fairest way to do it.

Mr. Lande: That would be true, your Honor, but we are being hurt here, I submit, in that in the divisor that you are using you are using a number that includes some full moon day when we couldn't fish.

The Court: The moon was coming up this night at 9:00 o'clock.

Mr. Lande: But it was within the fishing period. You see, from 7:00 o'clock on they still could fish.

The Court: They could fish all night in the dark.

Mr. Lande: In this particular case they couldn't.

The Court: As a matter of fact, the other boat was going home because the moon was shining.

No, I think this is about as fair and equitable a way as I can figure out. If you gentlemen can figure out the expenses, that will be fine; if you cannot then I will have to examine the exhibits and make a judgment on it.

Mr. Toner: I was at the point of reading some of these expenses.

The Court: I think you gentlemen can figure that out. You can sit down together and make those calculations. I have given you the basis to calculate it on and the gross value of the catch. You can figure that out and submit the judgment.

Court is adjourned.

(Whereupon, at 4:40 o'clock p.m., court was adjourned.)

[Endorsed]: Filed Feb. 18, 1948. Edmund L. Smith, Clerk. [185]



[LIBELANT'S EXHIBIT NO. 4]

In the District Court of the United States for the Southern District of California, Central Division.

Honorable Ben Harrison, Judge Presiding

Anthony DiLeva, Ivan Jurjev, Marie DiLeva, Mike DiLeva, Salvatore DiLeva, Jack Olsen, Marino Transatti, Angelo Castagnola, Chigi Romolio, Salvatore Carnevale, Matteo Bologna, Pasquale Guglielmo, and Peitro Colombo, Libelants, vs. Van Camp Sea Food Company, Inc., a corporation, Respondent. No. 4630-BH-Adm.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Thursday, May 16, 1946.

Appearances:

For the Libelants: Herbert R. Lande, Esq.

For the Respondent: McCutchen, Thomas, Matthew, Griffiths & Greene, by Harold A. Black, Esq., and George E. Toner, Esq.

Los Angeles, California, Thursday, May 16, 1946

10:00 A. M.

The Court: Are you ready to proceed, gentlemen?

Mr. Lande: The plaintiff is ready.

Mr. Toner: The defendant is ready.

The Court: Gentlemen, are you in position to stipulate to any of the facts?

Mr. Lande: The defendant has kindly consented to stipulate that if an official of the Department of Fish and Game of the State of California were called that he

would testify as set forth in this letter and attachment; and this letter is as follows:

"To Whom It May Concern:

"The official records of the California Division of Fish and Game show that 66,389,680 pounds of sardines were delivered in the Los Angeles area between October 4th and October 13th, 1944, both dates inclusive."

That is the date that the Bessemer lost fishing time.

Now, in order to get some comparisons we also requested the following information—the total deliveries in the Los Angeles area by months. They were for October, and then it gives the number of boats and the poundage of October, November and December. And then it says that the same boat, the Bessemer, delivered poundage during October, November and [3] December as follows, and states that poundage. And then it gives the daily deliveries of the Bessemer during October, November and December.

The Court: As I understand, gentlemen, that is stipulated to.

Mr. Toner: Yes, it is stipulated if the Chief of the Fish and Game Commission were called he would so testify.

The Court: In accordance with this letter and its attachments?

Mr. Toner: Yes. And I think it should be further stipulated that the sardines brought \$22.00 a ton at the time and that both of these vessels were owned by the Van Camp Company.

The Court: Sea Food Company.

Mr. Toner: Sea Food Company. And that this accident occurred on the evening of October 4, 1944, and caused physical damage which resulted in the lay-up of the Bessemer from that date to October 13th.

Those are the facts that would undoubtedly come out and they are stipulated to.

The Court: It is stipulated that the accident occurred at a certain time?

Mr. Toner: Yes, approximately 9:15 p.m. on October 4, 1944.

The Court: And the vessel was restored to service when? [4]

Mr. Toner: She went out again on the 14th of October, 1944.

Mr. Lande: That is correct. And during that period there were eight fishing days lost. May we have this marked for identification?

The Court: It will be received in evidence as Libelants' Exhibit 1.

(The document referred to was marked as Libelants' Exhibit No. 1, and was received into evidence.)

Mr. Lande: I think we can also stipulate, Mr. Toner, may we not, that the Bessemer was on charter to Salvatore DiLeva and that Anthony DiLeva was the master pursuant to that charter.

Mr. Toner: Yes.

Mr. Lande: And it was what was known as a "bare boat charter"—that is a charter that chartered the boat to the DiLevas and they were to victual, man, and supply and operate the vessel, and that pursuant to that charter—

The Court: The Bessemer was?

Mr. Lande: Yes. And pursuant to that charter the Van Camp Company was to get a certain number of shares for the use of the vessel and that the crew itself were to be paid by shares—that appears from admissions in the pleadings.

Mr. Toner: It isn't truly a "bare boat charter," if the [5] court please. It is a part of the agreement for operation.

The Court: Can't the agreement be introduced in evidence by stipulation?

Mr. Lande: I have the agreement here. Mr. Toner can see it. It was entered into in 1941, your Honor, and there was never any subsequent agreement entered into. They just went ahead on the assumption that that was in force and they operated the boat under just the oral understanding, more or less, from then on out. But this is the first and only charter party agreement that was entered into in writing between the parties.

Mr. Toner: I wouldn't want to stipulate to that particular charter because I haven't seen it as yet. I would rather reserve any stipulation on that score until I have a chance to look over the charter.

Mr. Lande: You can look at it during the recess and that will come into play only after liability has been established.

Mr. Toner: The important issue is as to the shares agreement upon which this boat and this crew were operating and I think that should come out by testimony.

The Court: All right, proceed.

Mr. Lande: Your Honor, your Honor probably noted from the answer to the libel, the second amended libel, the



allegations of Paragraphs 1, 2 and 3, and that they are admitted, so I won't go into the preliminary matters. [6]

The Court: There is no reason why you should go into matters that are admitted.

Mr. Toner: Before we start the testimony I should like to respectfully bring to the court's attention the fact that we are not going into the merits of the case but that in no way waives the allegations of our answer that no cause of action has been stated.

The Court: I assume your preliminary motions in that respect protect your record.

Mr. Toner: I just wanted to be sure of that, if the court please, and I think that we should go into the question of the legal effect of this shares agreement.

Mr. Lande: Take the stand, Mr. DiLeva.

### ANTHONY DiLEVA,

called as a witness by and on behalf of Libelants, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your full name?

The Witness: Anthony DiLeva.

### Direct Examination

By Mr. Lande:

Q. Mr. DiLeva, where do you live?

A. 1231 8th Street, San Pedro.

Q. What is your occupation?

A. Fisherman.

Q. How long have you been fishing? [7]

A. Oh, approximately nine years.

Q. On October 4, 1944, were you on the Bessemer?

A. I was.

(Testimony of Anthony DiLeva)

Q. In what capacity? A. I was on the mast.

Q. Were you the captain of the boat?

A. I was.

Q. Now, will you tell the—strike that. On October 4th whereabouts was the vessel?

A. At Catalina.

Q. At about nine o'clock?

A. Around Catalina Island.

Q. What fishing season was in progress?

A. Sardine season.

Q. And what type of boat were you operating?

A. The boat Bessemer.

Q. Is that a purse seiner?

A. Purse seiner. It has two different names. It has two different types of nets.

Q. But it is a purse seiner?

A. It is a purse seiner type, yes.

The Court: What was the size of the vessel?

The Witness: 73 feet.

Q. By Mr. Lande: What was the tonnage?

A. Tonnage was 51, I am pretty sure, 49 or 51. I am [8] not positive.

Q. Now, how large a crew did you have on board?

A. 14 men.

Q. That is including yourself?

A. Including myself, yes.

The Court: You were the master of the boat?

The Witness: Yes, sir.

Q. By Mr. Lande: Now, about nine o'clock whereabouts were you stationed?

A. I was stationed on the mast looking for fish.

Q. Now, will you explain to the court—

(Testimony of Anthony DiLeva)

Mr. Lande: Is the Court familiar with that or do you want to go into the details of that?

The Court: Yes, you are going to have to go into detail because I am not familiar with it.

The Witness: If you are not familiar with the fishing activities, usually a man, they call him the "mast man," he is in the crow's nest—that is in the pole. He is the man that looks for the fish. Then you have the man at the wheel and you have one at the controls.

Q. By Mr. Lande: Control of what?

A. The engine. He is the fellow—you tell him to go ahead a little faster or slower or reverse.

Q. Can you control your engines from the wheel house?

A. You can. They have controls upstairs. In fact, [9] they have got them in the pilot house and upstairs too.

Q. Now, the crow's nest is at the very top?

A. That is the pole.

The Court: I know what you mean.

The Witness: It is on top and you look out. You have a longer vision, I guess.

Q. My Mr. Lande: Now, who was at the wheel?

A. My father, Salvatore DiLeva.

Q. Who was at the engine controls?

A. My brother, Mike DiLeva.

Q. Where were the rest of the crew stationed?

A. All at their stations. In fact we were ready to lower the net.

Q. You say they were all at their stations. Now, tell the Judge what the different stations were.

(Testimony of Anthony DiLeva)

A. There is one on the bow—the bow man, because you see, Judge, you are not familiar with fishing activities. I say when you look for fish, when there is no moon, you look at the water first. That is how you tell. That is how you see the fish by the fire in the water. When the moon is up there is no more phosphorus in the water and for sardines they usually jump. They call them “flipping.” That is how you tell where the biggest bunch is and the flipping the most, that is where you usually haul the net. That is where you usually get the most and that is where we were. The moon was [10] up and we were listening for these flippers. We had two men in the skiff.

Q. Where was the skiff?                      A. On the stern.

Q. Attached to your vessel?

A. Attached to the vessel and the net attached to the little skiff.

Q. One end of the net?

A. One end of the net was in the skiff.

Q. And the other?

A. Was on the boat. Well, you go around—you have two men in the skiff with one end in the skiff and then you make your circle around the fish and then the other end, you go and pick up the skiff and you start pulling both ends.

Q. About nine o'clock that night or 9:15 did you come to a school of fish?

A. Oh, yes, we were on the school of fish.

Q. You were on a school of fish?

A. We were on a school of fish, yes.



(Testimony of Anthony DiLeva)

Q. All right. Now, tell us what happened?

A. Well, we was on the fish and you know, as I say, you know when the moon was out and these fish were starting to jump, well, when the fish start to jump you have to listen for them. You have usually one man in the bow and everybody—sometimes a couple of men and you listen for the bigger part [11] of the fish. Well, you have the men in the skiff ready to lower the net when you do hear the biggest part, so we were just circling around. We made a circle around the fish like this, and to the left, and then we stopped and this Gloria R made a complete circle far from us, not close, complete circle around us and went toward the east end of the Island again.

Well, we was looking to the Island and we happened to hear the fish more to the left so we made to get on right. We made a circle to the right and we were circling to the right.

Q. About how fast were you going?

A. Oh, just the propeller. Maybe one mile an hour. That is all. Not more than that. And as we were making the circle this Gloria R came from the east end and was coming out from the east end. Well, we noticed we were completing the circle and we kept one course to the island and we showed red and red light.

Q. Now, explain to the Judge what you mean by that.

A. Well, when you got a red and red light that is showing the port bow, port side of the ship—their port and our port. That is red lights. Starboard has a green light.

Well, when they are coming this way and they are showing their red light—in fact you have to go in oppo-

(Testimony of Anthony DiLeva)

site directions to show their red light and our red. You have to be traveling in opposite directions to show that, the same lights. [12]

Q. Do your courses have to be approximately parallel?

A. Approximately, yes. Not all the time, no. Don't have to be parallel. Could be going out this way (demonstrating) and you go this way (indicating) but still you see it—still you see just the red light. But in this case we were going parallel and then we were just heading with the propeller. We were going for the Island and he come out and all of a sudden the Gloria R started to turn and I seen—I started to see the red and green and I hollered at my father, "Watch out, he might make a turn in front of our bow." And it was going to be bad for us. All of a sudden I see him start. He did turn and I see his green—his green light, that is the starboard. He was cutting across our bow so I figured we were going slow enough that if we threw the propeller out of gear and threw the engine in reverse that we would clear him, but the Gloria R kept its course and I hollered and he never slacked his speed to try to avoid the accident.

Q. How many knots an hour was he going, do you think?

A. I figured around eight knots. That is about the speed. And he never did slack his speed. Well, your Honor, if he would have kept going on his course and us reversing full speed he would have cleared us, but I don't know if he got excited or what it is. He turned hard to port. Well, we were this way—brought me toward the Island this way and [13] he cut across like this (demonstrating) and as we were going astern, you know the

(Testimony of Anthony DiLeva)

stern of the vessel, any vessel when you go full speed astern, it has a tendency to go one way or the other. It never backs straight. Well, the Bessemer was—we were reversing and we were in reverse motion. The vessel was going a little to the port and that would bring our bow like this (indicating), and he was going straight, and if he would have kept the same course, the same course, we would have cleared him. We would have cleared him. We would have cleared his mid-ships, but he turned full speed, full speed to the port and that—there is his stern at us and as his stern hit us it pushed our bow out.

The Court: Did you give him any signals?

The Witness: Well, to tell the truth, we didn't have no chance. The only thing I figured we would have a chance to clear him, so we were going so slow—we threw our engine in reverse but just about when we were going to hit he sounded the whistle but that was too late—a few seconds before, but I figured if we—

The Court: Did he give you any signal?

The Witness: No signal at all. He didn't even try to avoid the accident. I hollered when he started to turn. I hollered and he never slacked his engine down or nothing. The only thing he did was turn hard to port and that was the worst thing he could do because that causes his stern or his [14] midship to push our bow out. You see, if he had kept going straight on his course that he was on he would have cleared us. He would have just cleared, barely cleared us.

Q. By Mr. Lande: At the moment of impact what was the direction of your vessel? Forward or astern?

A. Going slight astern because we were going slight ahead and then we had to throw the propeller out and

(Testimony of Anthony DiLeva)

throw the engine in reverse, full speed reverse and that takes a little time.

Q. Was his vessel visible to you?

A. At all times it was visible.

Q. I mean, it was a clear night?

A. Oh, clear—clear as a night could be. It was like daytime. The moon was out. It was just like daytime.

Q. Now, Tony, will you step to the board here and on this sheet of paper—this is north and south and west and east. Will you draw in Catalina Island and show the courses of the two different vessels, using the blue crayon for the course of the Bessemer and the red crayon for the course of the Gloria R.

A. I will say this is Catalina. That is not a very good island.

Q. We understand this.

A. This is the east end. This is Avalon. We were fishing right here (indicating). We had the skiff in the [15] stern here. The first time we seen the Gloria R he made a complete circle around us.

The Court: Let me ask you this: The first time you saw the Gloria R how far were you apart?

The Witness: Oh, about a mile and a half, I would say. We were the only two boats over there fishing. Then we happened to be alone that night and he made a complete circle around us. He went around us like that (indicating). While he was doing that we were listening to the fish here and we made a complete circle like this and we were laying like that again listening for the fish.



(Testimony of Anthony DiLeva)

Q. By Mr. Lande: Then you were both going in the same direction at that time?

A. We were, but when he made this circle he was way over here. He went to the east end of the Island again and then after we started circling—you see, these boats when they see one boat is on fish like that, when they are flippers, they usually all close in together and they have a tendency always to go close to one another and so we made the circle over here. We heard the fish more here. We figured they were traveling towards the east end, so we made a righthand turn like this and then we was headed for the Island and he heads out again like this. He was showing his red light, the port light, and we were showing our port light.

Q. Now, just a minute, Tony. May I take this pencil [16] and mark that position No. 2 where they are port to port.

The Witness: I made the drawing a little too close. All of a sudden he turns, turned hard port and this is about the position I seen him when he was this way here. From the mast I could see his red and green.

Mr. Lande: May I make that Position No. 3?

The Witness: That is the time I started to holler. I don't know if he heard me or not.

The Court: How far were you apart at that time?

The Witness: Oh, I would say about a quarter of a mile—no, not that much. About  $\frac{1}{8}$ th of a mile, I guess, and then after—oh, not even that much. What am I talking about? No; I guess it was about 200 feet.

The Court: 200 feet?

The Witness: Yes.

(Testimony of Anthony DiLeva)

Q. By Mr. Lande: Do you see the length of this courtroom? Would you say it was twice as far or three times as far as the length of this courtroom?

A. About three times as much.

Q. Approximately 300 feet?

A. Approximately 300 feet.

The Court: This courtroom is not 100 feet in length.

Q. By Mr. Lande: In other words, you think now—it is your best recollection now that it was about 300 feet away from you at that time? [17]

A. About that, yes.

Q. At that time you say you saw both red and green lights?

A. Yes. I hollered and that is when I told my father to go full speed reverse. Well, I figured that we were going so slow with the propeller that the boat will back up easy. We had the forward motion and to throw in reverse it takes some little time, but so little time that we would clear him and he just cut right across our bow this way in completing his turn and we were going full speed reverse and that threw the stern of the Bessemer this way, a little toward port, and then just when he got about to our bow he turned full speed—I mean hard over but he completed his turn and he smashed—

Q. Turned which way?

A. To the port, throwing his stern at our bow and that is where his—he was about three or four feet, I guess, aft of midships. That is where it smashed—pushed our bow there.

Q. Now, you draw the position of the boats at the time of the impact. Draw them in a little heavier.

A. It was over a little this way.

(Testimony of Anthony DiLeva)

Mr. Lande: May I label the position of the Bessemer then as No. 4 at the time of the impact?

The Court: As I understand the diagram, the red crayon represents the Gloria R.

The Witness: Yes. [18]

The Court: And according to the drawing, as I view it, the Bessemer hit—

The Witness: No, the Bessemer didn't hit the Gloria R. Her bow was there, but she was going in an astern motion and when he turned, if he would have kept his course this way he would have cleared the bow.

Respondent DiLeva: We would have sunk the vessel.

The Court: Did you hit him or did he hit you?

The Witness: He hit us. They have got pictures to show that our bow was pushed to starboard. If we would hit him straight the bow would have been smashed. It wasn't smashed. It was pushed.

Q. By Mr. Lande: Regardless of that, Mr. DiLeva, you actually saw the collision from the mast?

A. Yes, I seen everything.

Q. Now, at the time of the collision your vessel was going slightly astern?

A. Astern, yes. As I say, any vessel as soon as it is going full speed astern it has a tendency to go one way or another—either to port or starboard. No vessel, very seldom, do you see a fishing boat that will back straight up.

The Court: Did you have your nets out at that time?

The Witness: No. We had the two people in the skiff. Everybody was at their station ready to lower the net and as we went full speed reverse the stern turned a little to port. [19] That throws the bow a little to star-

(Testimony of Anthony DiLeva)

board and that is how he hit us. It was about three or four feet aft midship. That is what hit our bow. The Bessemer did not hit him.

Q. By Mr. Lande: In other words, is it right that as the Gloria R swung hard left the stern of her just sort of kicked around and smashed you in the bow?

A. Smashed in the bow, yes.

Mr. Toner: Just a minute, if the court please. I do not mind questions being somewhat leading, but I don't think that counsel should actually get to a point where he is testifying. That is why I make an objection to the question, and the answer, as leading.

The Court: It is nothing more than repetition of what the witness testified to.

Mr. Toner: I do want to get to the bottom of it and I haven't made any objection to leading questions but I think that question is very leading.

The Court: The objection is overruled. This witness seems to have the picture well in mind. The question asked by counsel was no different from what the witness has testified to. It was simply repetition in order to clarify the picture in the mind of the court, assuming that I have not understood the witness, which I have.

Q. By Mr. Lande: Now Mr. DiLeva, from the time you saw her red light off your port bow—that is when you were [20] red to red. A. Yes.

Q. Did you alter your course? A. No.

Q. Now, from any time after that—that is, after the time you were red to red, did you alter your course?

A. No. The only time I would alter my course a little was when we were in reverse and the boat would turn. As I say, it has a tendency to go one way or



(Testimony of Anthony DiLeva)

the other. That is the only time. But we were going in an astern motion.

Q. At the time of the impact, what, in your opinion, was the speed of the Gloria R?

A. About eight knots.

Mr. Lande: If your Honor please, is it agreeable to the court—I would like to have these witnesses testify first as to their liability so the continuity will be in the court's mind and not go into the shares agreement until after we have put in that part of the case. You may cross-examine. But before you cross-examine, may I introduce the diagram as the Libelants' Exhibit next in order?

The Court: Yes.

(The diagram referred to was marked as Libelants' Exhibit No. 2, and was received into evidence.) [21]

### Cross-Examination

By Mr. Toner:

Q. Mr. DiLeva, your father was at the wheel, is that right?

A. Yes, sir.

Q. He is not in the courtroom today?

A. No, he isn't.

Q. And as I understand it, you said that you made a complete circle around the fish?

A. Yes, I did.

Q. Now, which way were you circling? Were you circling in a starboard turn or port turn?

A. On a port turn the first time.

Q. First time?

A. Yes.

Q. And then you made a complete circle?

A. Yes.

Q. And at that time the Gloria R was far off of you, you said?

A. Yes.

(Testimony of Anthony DiLeva)

Q. About how far off?

A. About a mile and a half.

Q. A mile and a half away?

A. Yes, around that.

Q. And which way was the Gloria R headed at that [22] time?

A. Well, it was, as I said, he made the circle around us. He was in no particular course. He was just turning.

Q. That is the large circle?

A. That is the large circle around.

Q. And then he went down toward Avalon?

A. Toward the east end. That is where we were, off Avalon.

Q. He went down toward the east end of the Island?

A. Yes.

Q. And how long prior to the collision was that?

A. Oh, not very long, because he just turned when he got to the east end. We made the other circle to the right and then he turned out showing his red and our red and then after he made—he just turned his wheel and cut across our bow.

Q. Well, how long a time elapsed between the time the Gloria R was at the point I am marking "A" to the time she got to the east end of the Island?

A. I don't know. He was going eight miles an hour. You can figure that out yourself. I don't know.

Q. I want you to figure it out.

A. I don't know. I don't keep time on them.

The Court: You don't know?

The Witness: No. [23]

The Court: Was it an hour?

(Testimony of Anthony DiLeva)

The Witness: Oh, no. I can't say right to the minute. Approximately, about 10 or 15 minutes.

Q. By Mr. Toner: And what distance—what was the distance between A-1 and A-2?

A. Oh, about a mile and a half.

Q. Now, I am going to put in "1½ miles" here from A-1 to A-2.

The Court: When did you first feel there was going to be a collision?

The Witness: When I seen his port and starboard light both. That is a sign he is turning—he is starting to cut. That is when I started to holler. He didn't—he never—the fellows at the controls they just had time to throw the wheel out and throw it in full speed reverse, trying to prevent the accident, and then after I hollered and he never slowed the engine down or nothing. He just kept going, making his turn and that is when he hit us.

Q. By Mr. Toner: Now, in your complaint, or in your libel, Mr. DiLeva, you state on page 2 that "at said time the vessel was moving ahead slowly to lower the net, headed toward the east end of the Island with the Island approximately dead ahead."

A. That is right.

Q. That is correct? [24]

A. That is right.

Q. Now, where on your diagram is that?

A. Right here.

Mr. Lande: It says: "The Bessemer thereupon circled to the right in a clock-wise direction."

The Witness: That is right.

(Testimony of Anthony DiLeva)

Q. By Mr. Toner: That is your first circle.

A. No, that is the second. This is the first to the left. That was the first.

Q. The left circle was the first circle? A. Yes.

Q. Then you made a right-hand circle, is that right.

A. Yes, sir.

Q. So that the second circle your rudder was—

A. To the starboard.

Q. And you were proceeding to starboard, making a starboard circle? A. That is right.

Q. And then at Position 1, what light did you see on the Gloria R?

A. Position 1? Port light.

Q. You saw the port light or red light?

A. The red light.

Q. That is the port light? A. Port light. [25]

Q. At Position 1. And what was the bearing of the Gloria R to the Bessemer at that time?

A. Oh, it was about southwest, I guess.

Q. Well, was it off your port bow?

A. Yes, port bow. Off our port bow, yes.

Q. That is Position 1? A. Position 1.

Q. You saw red.

Mr. Lande: There is no Position 1 on the map.

The Witness: Here is where we were. You didn't mark this position. This is Position 1. Here is where our port bow is and that is where his port bow is.

Q. By Mr. Toner: I am marking this as Position "No. 1." And which is the bow of the Bessemer at Position 1?

A. Towards the Island.

Q. This is the bow of the Bessemer at Position 1?

A. Yes.



(Testimony of Anthony DiLeva)

Q. And this is the stern? A. Yes, sir.

Q. And at that time you saw the Gloria R's red light?

A. Yes.

Q. Off your port bow?

A. To tell you the truth, the first time we seen him, we seen his red light but he was way off. We didn't pay no [26] attention to him because we were on the fish.

Q. What I am getting at is when you were at Position 1 where was the Gloria R? A. Down here.

Q. Where with reference to your boat? Off the port bow? A. Port bow, yes.

Mr. Lande: May I indicate on the map—

The Witness: That is Position 1 of the Gloria R.

The Court: Yes.

Q. By Mr. Toner: Now, at Position 2 what light of the Gloria R did you see?

A. Still her port light.

Q. You saw her red light?

A. Yes, off our starboard bow after they come around at this position here. That is when we seen still their port light and our starboard, but you see, this is us in Position 1. We made this turn.

Q. This No. 1 is you at Position 1? A. Yes.

Q. And here is the Gloria R at Position 1?

A. Yes.

Q. And then they went around you? A. Yes.

Q. And then at Position 2 you saw the Gloria R's red [27] light. A. Yes.

Q. And that was off your— A. Port bow.

Q. Now, how far off was the Gloria R at that time?

A. At Position 2?

Q. Yes. A. I say about 300 feet.

(Testimony of Anthony DiLeva)

Q. And then the Gloria R you say made a turn?

A. To port.

Q. To port? A. Yes.

Q. And at that time you saw the red and the green lights?

A. And green as he was turning. That is just when he was starting to turn, you see, at this position here.

The Court: I understand what he means by that.

The Witness: When you are starting to turn, here is his port. Here is his red light. Here is the port light. It is the red. The starboard is green. That is when he was starting to turn. You can see both lights then, but after he completes the turn you just see his green light. You don't see his port light any more.

Q. By Mr. Toner: At Position 2 you were in a starboard circle around the fish, weren't you? [28]

A. At Position 2? Yes.

Q. You were making a starboard circle?

A. Yes.

Q. And had you intended to complete that starboard circle?

A. We did. We did complete it. We were heading in the same course for the Island listening for the fish coming this way.

Q. This is the starboard circle you are talking about here? A. That is right.

Q. The blue line that is marked A-2, that is part of your starboard circle?

A. Yes, that is the circle.

Q. Then you left your skiff up in the—

A. No, we didn't leave the skiff. The skiff was always in the stern. We did not lower the net.

(Testimony of Anthony DiLeva)

Q. The skiff was attached to the vessel?

A. Yes.

Q. To the Bessemer? A. Yes.

Q. And the idea of making a circle around the fish is to complete the circle?

A. Well, it is the idea of—you are talking about the skiff now? [29]

Q. What maneuver were you going through? What operation were you performing?

A. Listening for the biggest body of the fish, the flipping.

Q. You were on the school of fish.

A. We were on the fish.

Q. You intended to circle that school of fish.

A. Yes, sir.

Q. And that is why you were making the starboard circle?

A. Yes, to get on the most part of the fish.

Q. And you usually complete the circle, don't you?

A. Yes.

Q. So you intended to continue that starboard circle until you had completed it?

A. That is right.

Q. So had the accident not happened you would have— A. Wound up in the same position.

Q. Wound up about where you started your circle?

A. That is right.

Q. So that when you made the statement that you did not alter your course, you mean that you did not intend to change that starboard circle? A. No.

Q. You were in a starboard circle and you had left [30] your rudder set hard to starboard?

(Testimony of Anthony DiLeva)

A. That is right. We made the circle. Here is the circle we made. Then when we get to the fish we stop, usually stop. We were just about ready to stop anyway to listen to the fish again, to see if we were on the biggest part of the fish and that is when he cut across our bow.

Q. But you had not stopped?

A. We were going with the propeller. The circle was made but we were going straight for the Island.

Q. At that particular time you were going straight for the Island?      A. Yes, sir.

Q. But if the Gloria R had not been there you would have continued?

A. No, we would have kept going straight for the Island. The circle was made.

The Court: How were you going to get your nets out?

The Witness: That is how it is. You see, your Honor, when we were at this position we had the fellows in the skiff. We made the circle from the fish to the left. Well, we were just at the position to lower the net. That is why we had the men ready as we find the fish. Then we are right ready to lower the net and we then just lower it when we find the biggest body of fish. That is the position we were in.

Q. By Mr. Toner: How large a school of fish was it? [31]

A. It was a big school. There was enough for both of us.

Q. How much of an area did it cover?

A. Oh, it covered, I would say, a good mile all around.

Q. All around?      A. Yes.



(Testimony of Anthony DiLeva)

Q. How close to the edge of the school do you come with your boat?

A. You never know that because you don't see the fish when there is a moon up. You don't see them. You just hear them flip.

Q. You are watching pretty close?

A. You have to hear them and where the biggest body is that is where you lower the net. Usually, sometimes you get a load and sometimes you don't. It is more of a guess.

Q. If you are lucky you get a load?

A. If you are lucky you get a load? It depends on the fish. A lot of times they are flipping lots and you don't get nothing and sometimes there are only a few flippers and you load up.

Q. When you are making these circles you have to be pretty alert, don't you, so the fish don't get away?

A. That is right.

Q. And you are up in the crow's nest for the very [32] purpose of seeing that the fish don't get away?

A. That is right.

Q. Now, what lights did you have on the Bessemer?

A. The running lights is all.

Q. That is red and— A. Red and green.

Q. Did you have any light on the mast?

A. No light on the mast.

Q. You had no red light on the mast? A. No.

Q. No white light on the mast? A. No.

Q. Did you have two white lights on the mast?

A. None.

Q. Are you familiar with the fishermen's custom in San Pedro? A. I am.

(Testimony of Anthony DiLeva)

Q. That when a boat is on fish they are supposed to have a red light in the mast?

A. It is not when they are on the fish; it is when they are lowering the net to put the red light to show they are lowering the net. That is the custom.

Q. In any event, you had no light on?

A. No light on the mast, no.

Q. What lights did the Gloria R have on? [33]

A. Running lights, the same thing.

Q. Running lights? A. Yes.

Q. Red port light and green starboard light?

A. Red port and green starboard, yes.

Q. Now, as you were making this circle to the starboard the bearing of the Bessemer to the Gloria R, or vice versa, the bearing of the Gloria R to the Bessemer would constantly change, would it not?

A. What do you mean? When he made the circle?

Q. Well, as you were making the circle, when you are headed in an easterly direction— A. Yes.

Q. You would see the Gloria R over your starboard side or stern? A. That is right.

Q. And then as you come around you would see the Gloria R dead ahead, wouldn't you?

A. No; because they weren't in this position when they were turning. They were on this, about right over here then. They did not come straight out until we completed the circle.

Q. Indicating "over here" is indicated by the letter B. When the Gloria R was at "B" you would probably see her over your starboard?

A. Yes, we would be coming here and they would be on [34] our starboard, yes.

(Testimony of Anthony DiLeva)

Q. Then as the Gloria R continued on from "B" to "C" and you continued on from A-2 to say B-2, the bearing of the Gloria R would change, wouldn't it?

A. Still see their red light.

Q. You would see them first over your starboard bow and then as you came around you would see them over your port bow, wouldn't you?

A. That is right.

Q. In this position at B-2 was there ever a time when you saw both lights of the Gloria R?

A. No.

Q. You saw only their red light?

A. Red light.

Q. And the only time that you saw—

The Court: I understood he said he saw both lights.

Mr. Toner: I am coming to that.

Q. When he is up here then the only time that you saw both lights was after you reached the position marked No. 2 here?

A. Yes.

Q. And you state that the Gloria R made a port turn?

A. That is right.

Q. So as to turn her bow directly toward you?

A. That is right. [35]

Q. Was it dark at the time.

A. No; it was clear as day.

Q. Visibility was good?

A. Very good. The moon was out. It was like day-time.

Q. And you say that you blew no whistle?

A. We did just before we were ready to collide, about two or three seconds.

Q. You blew a whistle about two or three seconds before you collided?

A. Yes.

Q. Now, were you giving the orders?

A. I was.

(Testimony of Anthony DiLeva)

Q. From the crow's nest? A. I was.

Q. You were what is called the "Fish Captain," is that it? A. Yes, I was.

Q. You gave the orders to the pilot house?

A. Yes.

Q. And the pilot house operates the controls?

A. Yes.

Q. And you had two men in the pilot house; one was your father?

A. Three. We had Mr. Carnevale. He was up there too.

Q. In the pilot house? [36] A. Yes.

Q. He was not at the controls?

A. No; he was just watching the fish.

Q. Who was at your bow?

A. There was a fellow who couldn't come up today.

Q. What is his name? A. Chigi Romolio.

Mr. Toner: I think that is all.

The Court: Just a moment. In maneuvering that night were you following the usual and ordinary custom of sardine fishermen at San Pedro?

The Witness: Yes, sir.

The Court: In circling a school of fish?

The Witness: It is a little irregular, the right-hand turn in fishing, because usually it is always to your left, but this right-hand turn was, as I say, to get—you don't see the fish. You just hear them. You just hear where the biggest body is.

The Court: You simply circle around the school of fish?

The Witness: Yes.



(Testimony of Anthony DiLeva)

The Court: Was the practice that you were following the usual practice?

The Witness: Yes, it is.

The Court: And the Gloria R was also following the usual practice? [37]

The Witness: Well, your Honor, that—as I say, the boats get together like when the moon comes up and the fish start flipping. When they see a boat turn a couple of times that means they are usually on fish and they always have a tendency of coming close because the flippers are always in one area, close to one another, and they have a tendency to come close to the boats, because there is usually more than enough for one.

The Court: There was nothing unusual then about the Gloria R circling around?

The Witness: No, nothing unusual.

The Court: He was not maneuvering contrary to custom?

The Witness: No.

The Court: What was wrong then with his maneuvering?

The Witness: Because he cut across our bow. That was the only wrong thing he did.

The Court: In other words, he should have continued on his course?

The Witness: He should have when he saw it was red and red—that is, he should have crossed our stern again. He should have kept going—he should have continued showing the red light and passed our stern and then he could have went any other way he wanted, unless there was another boat in back and at that time there just happened to be us two boats.

(Testimony of Anthony DiLeva)

The Court: It was not an occasion where each boat was [38] fighting for the same fish?

The Witness: No. As I say, there is a tendency when there are fish flipping like that to try to get close together and usually after one lowers a net the other lowers it right next to us.

The Court: In other words, the boats work together?

The Witness: No, they don't work together. The fish work together.

The Court: There was no question of intrusion on fish that you had located?

The Witness: No. Just that he probably seen us with the men in the skiff and circling on the fish and he thought we were ready to lower the net and he would come right next to us and start looking for his. That is all.

The Court: Then you feel that his error was in making too sharp a turn and cut into your bow?

The Witness: Yes.

The Court: And when you realized that you put your engine in reverse and was trying to avoid the accident?

The Witness: Yes.

The Court: And according to your testimony you were pulling away a little bit?

The Witness: Yes.

The Court: Any additional questions?

Mr. Toner: I have one more question, if the court please. [39]

(Testimony of Anthony DiLeva)

Q. By Mr. Toner: You stated that the net was partly in the boat and partly in the skiff?

A. Yes. You have what you call the line. You have a little line at the end of the net and then when you lower the net then you go and pick up the skiff again and they throw that line onto the boat and then you start pulling both ends.

You have got rings on the bottom of the net that you close the net with and that traps the fish and then you start pulling the net in.

Q. How much of the net was in the skiff?

A. Oh, none—just the rope—just the rope for the skiff men to throw onto the boat. No net goes in the skiff.

Q. Was any of your net in the water?

A. None.

Q. Any of the rope? A. None.

Q. In the water? A. None.

Q. But part of the line from the net was in the skiff? A. In the skiff, yes.

Q. You said further that the Bessemer and Gloria R collided and that the collision was between the stem of the Bessemer and the stern?

A. Not the stern. I said three or four feet aft of midship. [40]

Q. Three or four feet aft of midship?

A. Two or three feet.

Q. Two or three feet?

The Court: I understand you have photographs of the Bessemer taken after the collision?

Mr. Toner: I don't have any pictures.

The Witness: The insurance company took pictures.

(Testimony of Anthony DiLeva)

Mr. Toner: I don't have any, but I think it is established the accident happened about midships on the Gloria R.

Q. Is that correct?           A. That is correct.

Mr. Toner: That is all.

(Witness excused.)

Mr. Lande: Salvatore Carnevale.

SALVATORE CARNEVALE,

called as a witness by and on behalf of the Libelants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Salvatore Carnevale.

The Court: I do not know that this is altogether regular. We have one version of the accident.

Mr. Lande: Everything I put on from now on is corroborative. [41]

The Court: Why not hold the corroboration and use it for rebuttal and determine what the differences are between the parties?

Mr. Toner: That is an excellent idea, if the court please, and we are now permitted to put on our witnesses out of order.

The Court: What I mean is, the court has one picture as to the contention of the libelant in this case and I want to see where the differences are—where the conflict comes in.



Mr. Toner: There will be certain items where the stories will be the same and certain items where there is definite conflict.

The Court: And I want to determine what the conflicts **are**.

Mr. Toner: Incidentally, if the court please, there are two Anthony DiLevas in this case—the one who just testified, the master of the Bessemer, and the Anthony DiLeva that was the master of the Gloria R.

The Court: What is the relationship?

Mr. Toner: Cousins.

The Court: Well, we will call one “Anthony” and the other “Tony.”

Mr. Toner: I was going to suggest that we call one “Tony Bessemer DiLeva” and the other “Tony Gloria R Di Leva” [42]

Will you take the stand?

ANTHONY GLORIA R. DiLEVA,

called as a witness by and on behalf of the Respondent, testified as follows:

The Clerk: State your full name.

The Witness: Anthony DiLeva.

Direct Examination

By Mr. Toner:

Q. Please state your address.

A. 660 9th Street, San Pedro, California.

Q. You were the master of the Gloria R on October 4th, 1944?

A. That is right.

(Testimony of Anthony Gloria R. DiLeva)

Q. That was not your regular boat?

A. No. Our regular boat was broken down. We were just chartering this boat for the time until our boat was ready to go fishing again.

Q. And the boat was owned by—

A. Van Camps.

Q. Now, on the night of October 4, 1944, your boat and the Bessemer were in collision, were they not?

A. That is right.

Q. And whereabouts did this collision occur?

A. Well, right out of Avalon Bay.

Q. About how far off the Island? [43]

The Court: Did the former witness describe its location approximately?

The Witness: That is about the right position, about four miles from the Island—three or four miles.

Q. By Mr. Toner: Now, will you describe the lights that you had on the Gloria R?

A. We had just our running lights, starboard and port lights.

Q. Red light for the port side and green light for the starboard side?

A. That is right.

Q. And those lights are set in screens, are they not?

A. Yes, sir.

Q. So that the red light cannot be seen off the starboard bow and the green light cannot be seen off the port bow?

A. That is right.

Q. And the screens are so constructed they cannot be—the light cannot be seen more than two points abaft the beam?

A. That is right.

(Testimony of Anthony Gloria R. DiLeva)

Q. Now, where were you at the time of the collision?

A. Up in the crow's nest.

The Court: You were looking for fish, too, were you?

The Witness: Yes, sir. [44]

The Court: You were also called the "Fish Captain"?

The Witness: That is right.

Q. By Mr. Toner: Who was at the bow?

A. At the bow of our boat, he is not here at present.

Q. And who was at the wheel?

A. Biagio Como.

Q. And who else was on the house with Biagio Como?

A. Nicola Kerchi.

Q. Were there several others in the house, too?

A. Just one other and he is not here.

Q. Now, what were you doing at the time?

A. We were looking for fish, too, but the moon was already out an hour or so.

Q. And what did you decide to do?

A. After we ran around a while and didn't find any, we decided to go on home.

Q. By "home" you mean to San Pedro?

A. That is right.

Q. And where were you at the time you decided to go home?

A. As soon as we circled inside the Bay and we didn't find anything we put our bow straight out for San Pedro. That was north and a little bit west.

Q. And you intended to return to San Pedro?

The Court: Did you say there was no moon out at that [45] time?

The Witness: The moon was out over an hour.

(Testimony of Anthony Gloria R. DiLeva)

Q. By Mr. Toner: When you set your course for San Pedro about what course was it?

A. North, a little west. In that position there where we were at.

Q. I am going to ask you to draw—

Mr. Toner: Can the Court see down at this part of the blackboard?

The Court: If he uses the blackboard you have no record. Why don't you have him draw it in the other half of the paper, Libelants' Exhibit 2?

Mr. Toner: I thought we would use the blackboard because we can make a larger diagram and then copy it.

The Court: You may use the blackboard as far as the court is concerned.

Mr. Lande: We have two sheets of paper there. Let him use one.

The Court: I want the first one to remain so I may see the difference.

Mr. Toner: I am going to mark this one "Libelants" and this one "Respondent."

Q. Now, let us put the Island here. This is the end of the Island. Now, will you come down here, Tony, and draw in your boat about that large, and indicate where you were [46] when you started your course to San Pedro?

A. Well, we came out here from the east end of the bank, out here, so we head over to Catalina looking for fish.

The Court: Did you get fairly close to the Island?



(Testimony of Anthony Gloria R. DiLeva)

The Witness: Well, we came out here. The Bessemer claims he was circling around fish about here, a circle like that.

The Court: What is that circle?

The Witness: He said he circled around the fish.

Mr. Toner: I think we had better use the red crayon for the Gloria R and the blue crayon for the Bessemer.

A. We come out here close to the Island, towards the east end there and did not find anything, so we headed out. We kept on a course straight out to San Pedro here and we headed for San Pedro. This would be the Gloria R like that. Well, he was circling around the fish here and he was looking more to the east—his bow towards the east. We could only see his green light at all times. That is all we seen was a green light and the only light he could see of ours was our green light on this side because our red one would be over here. He claims he was circling on fish. When we are circling on fish the regulation, the way we do it, we put a light on warning the boats, a red light, and he had no red light on, so we kept on traveling straight out this way towards San Pedro and he says that later on he turned to his [47] starboard.

The Court: I don't care what he said; tell us what happened.

The Witness: All right. So we kept going. We got out to about this here position, out here, and he kept running a little ways, circling on the fish. As soon as we got over here we seen this boat. He said he turned to the starboard. He turned to the starboard. We kept going a little ways. He says he threw it in reverse. We

(Testimony of Anthony Gloria R. DiLeva)

kept our same course without changing. The only time we changed our course was when the accident could not be avoided. We turned to the port. If he had turned port, too, it would have avoided the accident because us turning to port we would go that way and his turning to port he would go this way.

Q. By Mr. Toner: Now, when was that turn to the port? Before the collision? A. That was too close.

Q. How many seconds? Was it seconds or minutes?

A. Seconds—a matter of a minute. A matter of a minute you can get away from a boat.

Q. How many seconds? A. Three or four.

The Court: But you saw the Bessemer at all times?

The Witness: Yes, sir. We seen the Bessemer all the time. [48]

Q. By Mr. Toner: How large a circle was he making here around the fish?

A. Well, the average circle. When you set around fish that is about the size there.

Q. How big is that?

A. Oh, about 240 fathoms.

Q. That is how many feet? A. (No answer.)

Q. About 1,440 feet?

A. While he was circling on the fish then he said he turned hard starboard—starboard would be leading to his right and that way he led right into us and he hit us right amidship.

The Court: He hit you?

The Witness: Well, naturally, we can't hit him, your Honor.

The Court: You claim he hit you?

(Testimony of Anthony Gloria R. DiLeva)

The Witness: Well, we can't hit him, your Honor, pardon me, because he hit us with the bow. If we hit him our bow would have been smashed in and not our midship. We are not going to glide into a ship. The Gloria R was hit amidship.

The Court: The Gloria R was hit amidships?

The Witness: That is right.

The Court: And was the Bessemer hit in the midship-

The Witness: The Bessemer was hit in the bow. [49]

Q. By Mr. Toner: The damage to the Bessemer was in the bow?

A. The forward part of the boat. In other words, collided right here amidship.

Q. Now, Tony, if the Bessemer had continued making its circle of the fish and had not made this starboard turn just as you were passing would you have cleared the Bessemer?

A. We would have cleared his stern and kept on our course right out. The Bessemer was laying like that and we would have cleared the stern.

Q. Had you any reason for making a turn to port as the previous witness described?

A. The only reason we had to turn to port was we tried to avoid the accident by turning to the port. We turned to port and since he was always circling to the port, if he would have turned to the port both boats would have not had collided.

Q. The only turning you did—

A. Was to the port.

Q. Three seconds before the collision?

A. Yes, and that was too late then.

(Testimony of Anthony Gloria R. DiLeva)

Q. What was the purpose of that turn?

A. To try to avoid the accident by turning to port.

Q. The last-minute effort to avoid the accident, is that right? [50]

A. Yes, sir.

The Court: You were sailing pretty close to him, weren't you? In view of the fact that he was circling for fish?

The Witness: We always run close to each other.

The Court: But you were headed for home?

The Witness: That is right.

The Court: You were not fishing?

The Witness: I was still in the mast. We had our bow toward home. I did not say we were heading home. I said we had our bow headed towards San Pedro. You always turn to your port and not to the starboard. He claims after turning one to the port he turned once more to the starboard and when he turned to the starboard he turned on us. That is where the accident occurred. And anyway, we didn't know what the boat was doing. All we seen was his green light and no red light warning us that he is going to set because before you set you put on a red light warning the boat you are on the fish and to stay away from him because he is laying his net out and not after the net is in the water.

We had no warning that he was going to turn to the starboard.

The Court: And your vessel was hit amidships?

The Witness: Yes, sir.

The Court: And was it crushed in? [51]

The Witness: Just the guard rail. There was no damage.



(Testimony of Anthony Gloria R. DiLeva)

The Court: And the Bessemer?

The Witness: His bow was torn off.

The Court: Torn off?

The Witness: Yes. When he hit it was solid and his bow smashed in. That is why he had to stay up because the boat sprung a leak.

Q. By Mr. Toner: You can sit down again, Tony.

Now, did you have evidence that would indicate that the Bessemer was on fish?

A. No, we didn't have no evidence.

Q. Did you think they were on fish?

A. We always seen his starboard light when we left the east end of the Island heading toward San Pedro there. All we seen was his green light.

Q. What about the San Pedro custom about having masthead lights? When do you put out your masthead light?

A. All the boats and we do, too, just before you lay out on fish, while circling, the boat while on fish puts on a red light and not after you are in a halt, because somebody comes by and will go through your net.

Q. Now, the idea is in fishing you circle the fish to make them congregate into a smaller space?

A. That is right.

Q. And after you have made several circles around the [52] fish then you lay your net around the fish?

A. That is right.

Q. And the San Pedro custom is when you are circling the fish you have to have a masthead light, is that correct?

A. Usually put a red light on warning the boat you are going into a halt. He had no red light and no

(Testimony of Anthony Gloria R. DiLeva)

whistle of warning us that he was on fish. We are not supposed to know what he is doing there.

Q. Now, had he not—

The Court: You knew he was not out there for his health, didn't you?

The Witness: He was out fishing when the moon was out.

Q. By Mr. Toner: Had he not made this right-hand turn into the starboard beam of the Gloria R, about how far would you have come to the Bessemer?

A. Of clearing him?

Q. Yes, how much distance?

A. About 100 feet or more off his stern, would have cleared his stern.

Q. Now, was he at any time across your course? Did he cross your course here at any time?

A. You mean—

Q. When you saw his green light?

A. That is right.

Q. Did he cross your course? [53]

A. No. Just seen his green light all the time. We never seen his red light.

Q. You never saw his red light?

A. Just the green light.

The Court: You said there were some photographs.

Mr. Lande: We have no pictures, your Honor. All the pictures were taken by the Respondent.

Mr. Toner: The libelants' testimony as to pictures was the first I heard of them. I will make every effort to get them. I am sure if there are pictures I can get them. I haven't had them, though.

Q. You stated that the Gloria R was hit amidships?

A. That is right.

(Testimony of Anthony Gloria R. DiLeva)

Q. Now, how long a boat is the Gloria R?

A. 78 foot.

Q. And amidships would then be 35 feet or 39 feet?

A. That is right.

Q. Was it hit exactly amidships or was it a few feet forward or aft of amidships?

A. Well, it was hit in the forward part—forward of the rigging of the mast. The rigging was hit forward—just about two foot forward of that.

Q. Two foot forward of the mast rigging?

A. Yes.

Q. And what damage was done to the Gloria R? [54]

A. Just smashed a guard rail—smashed in a little—not much damage done to it.

Q. Did you see the damage to the Bessemer?

A. We stood by him after the collision happened.

Q. What was the damage?

The Court: You gentlemen should be able to stipulate as to the nature of the damage to the Bessemer. You both had an opportunity to see the boats, I presume?

Mr. Toner: In a case like this, if the court please, the forward motion of the Gloria R. and the sideward motion and also the forward motion of the Bessemer would cause an inward damage on the Bessemer—

The Court: I understand the damage to the Bessemer was the bow.

Mr. Toner: It was on what is called the stem. That is the piece that comes down and joins up with the keel.

The Court: I wish you would bring into court any photographs of the damage done. I cannot visualize how one ship can be damaged amidship and the other one in the bow and yet the testimony is that the Gloria struck

(Testimony of Anthony Gloria R. DiLeva)

the Bessemer and the Gloria received only a scratched guard rail.

Mr. Lande: If your Honor has noticed how a street-car comes around a track when it makes a curve—the rear end of the street car will sort of not follow a true circle but will sort of skid out and make a wider arc than the tracks under- [55] neath. Much the same thing happens, Mr. DiLeva tells me, when a boat's rudder is put hard to the right or to the left. That is the rear end or the stern of the Gloria R—you see the boat is on a curve there, of course, and as the rudder—you see the thing is controlled by the rudder in back and it is a forward and sideward motion. In other words, the rear end of the Gloria R sort of skidded out past a true circle. The boat has a tendency to turn on a point amidships.

The Court: In asking these questions I am trying to clarify in my own mind as to what happened. For instance, Tony Bessemer in this case states the Gloria R collided with his boat and I understand Tony Gloria says that the Bessemer hit his boat, isn't that true?

The Witness: That is right.

The Court: Proceed.

Q. By Mr. Toner: At the time of the collision was the Bessemer in motion? Was the Bessemer moving?

A. She was moving.

Q. Which way was she moving?

A. She was moving onto us.

Q. Forward? A. That is right.

Q. Not moving astern or standing still?

A. No. Anyway, when your boat is moving forward, when you have your propeller in she don't stop on a dime



(Testimony of Anthony Gloria R. DiLeva)

when you [56] throw in reverse. She still has the forward tendency—the tendency to go forward a while.

Q. Her engines may have been in reverse but the boat was going forward?

A. It was still going in a forward motion. That is not an automobile to come to a dead stop and put in reverse and back up.

Mr. Toner: I think that is all. You may cross-examine.

### Cross-Examination

By Mr. Lande:

Q. Mr. DiLeva, isn't it a fact that according to the International Rules and custom in San Pedro, the red light is only put on when the boat is ready to and is lowering the net to catch the fish?

A. Not necessarily. When you are circling on fish a lot of times you put on the red light.

The Court: What is the custom?

The Witness: The custom is two white lights and no fishing boat uses the two white light custom in San Pedro.

The Court: What is the custom of putting on the red light on the mast?

The Witness: That is to warn the boat.

The Court: When?

The Witness: Before you lay your net out.

The Court: How soon before? [57]

The Witness: Sometimes some boats put it on—stay on fish for a half hour and put it on right after the first—keep the light on for a half hour and keep circling around the fish.

(Testimony of Anthony Gloria R. DiLeva)

The Court: Sometimes they put it on just before they drop the nets, too, do they not?

The Witness: Yes.

The Court: They do it both ways?

The Witness: Yes, that is right.

The Court: The fact there was no red light would not indicate that the Bessemer was not going to drop its net?

The Witness: He claims he was on fish. He seen we were there. Why didn't he warn us that he was on fish so we could stay away from him?

The Court: Why didn't you stay away from him?

The Witness. We did not know he was on fish.

The Court: You saw him there and you saw the boat. You had the entire ocean there.

The Witness: That is right. We were headed straight out north to San Pedro. We would clear him. We weren't going to hit him. We were going to pass the stern of him. He would have been laying like this and we pass on the stern of him going to San Pedro.

Q. By Mr. Lande: You could have just as well gone to San Pedro and passed a couple of hundred yards astern? [58]

A. We happened to be on that course and kept going on it.

Q. And you did not bother to move over to give him a wide berth, then, did you?

A. Well, how do we know he is on fish?

Q. You saw him circling, didn't you?

A. No, we didn't. We just seen his green light.

(Testimony of Anthony Gloria R. DiLeva)

Q. Haven't you got your diagram there indicating that the Bessemer was circling?

A. He claims that is what—he says—he claims he was circling on the fish. I did not say I seen him.

Q. Well, you saw him some time before the collision, didn't you?

A. Yes; we passed—we passed on the outside of him. We seen his green light just like he says here.

The Court: As I understand it, this may says he saw the green light and the other witness said he saw nothing but the red light.

The Witness: We were hit on the starboard side.

Q. By Mr. Lande: But that was after you had turned to port, though, was it not?

A. No, sir, always on the course.

Q. Where was your course headed for? San Pedro?

A. Eventually north, north and west.

Q. Had you given up fishing? [59]

A. I was still in the mast. We were still looking for fish.

Q. Then you were still looking for fish and were not heading for home giving up?

A. You could look for fish from Catalina on home. There was a—we would have to drift four hours if we got there so we could look for fish on the way home, which boats do sometimes.

Q. When was the first time you saw the Bessemer?

A. When we came around him—when we came to the Island like he has his diagram drawn here. Came around from out here and we seen him right over here and we made a turn.

(Testimony of Anthony Gloria R. DiLeva)

Q. All right. Now, let us mark on this diagram where you were making this circle towards the Island. Did you see the Bessemer over—

A. We seen the Bessemer as soon as we approached the Island out here.

Q. Put an "X" where your vessel was when you first saw the Bessemer.

A. When we first seen the Bessemer?

Q. Yes.

A. We come around and circled up this way.

Q. Put it in heavy. Put it in red because red is your boat. A. All right. [60]

Q. Now, while you made this big circle that you have indicated there, you saw the Bessemer all that time, didn't you? A. Yes; and he could see us too.

Q. All right, and you saw that he was circling on fish, didn't you?

A. We were looking for fish. We weren't paying attention to him. We just seen the vision of a boat there. He could see us, too. He just said that you could see a boat way off.

The Court: Don't argue. Just answer the questions.

Q. By Mr. Lande: Is it your testimony, then, that you did not observe the Bessemer as you made that circle?

The Court: His testimony is that he saw the Bessemer.

Q. By Mr. Lande: Did you see him and then glance away and not look at him again?

A. That is right; because we were looking for fish just like he says. When you are on fish you are looking



(Testimony of Anthony Gloria R. DiLeva)

for fish. You are looking to lay your net out. We weren't paying attention to him and we came out there looking for fish.

Q. Well, don't you watch the boats around you?

A. Sure, we seen the boat.

Q. When you are circling?

A. That is right. When we were off from them.

Q. You admit that it is your duty as the mast man to [61] watch for the different boats?

A. Not to watch for boats as mast man. It is the duty to look for fish.

Q. Is that the duty of the wheel man?

A. He is at the wheel to steer the boat. I am looking for fish.

Q. Now, isn't it a fact that it is your duty to turn the wheel or call out to the wheel man when you see a boat? A. No, sir.

Q. In the way there?

A. No, sir. I am in the mast. The man at the wheel can steer the boat the way he wants when he is on the fishing ground. It is not my duty to go to the starboard or port or steer straight ahead. We don't do that on our boats.

Mr. Lande: I have no further questions.

The Court: That is all.

Mr. Lande: Just one more question.

Q. At the time of the impact how fast was the Gloria R going? A. About eight knots.

Mr. Lande: That is all. Shall we proceed now, your Honor?

The Court: Yes.

Mr. Lande: Mr. Carnevale, will you take the stand? [62]

SALVATORE CARNEVALE,

called as a witness by and on behalf of the Libelants, having been previously duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: Salvatore Carnevale.

Direct Examination

By Mr. Lande:

Q. You were on the Bessemer the night of this collision, weren't you?      A. Yes.

Q. Whereabouts were you on the boat?

A. What?

Q. Whereabouts were you on the boat?

A. I was alongside his father, alongside the wheel.

Q. In the wheel house?

A. Yes; on top of the pilot house.

Q. Now, tell the Judge what happened at the time of the collision. You tell it in your own words, what you saw.

A. Well, the first time, you know, we see this boat, the Gloria R, we see it go east end, and we come right in front of Avalon there. Well, when we go over there and we find the fish and we circle around about three or four times, and the moon come up and we see the fish very good and, well, when we saw the Gloria R we circle over there and then he [63] figure we got fish, because he was over there first—he don't find no fish. After he see us circling around and he come in close, you see. Well, he come in close. It was—a guy said, "Well, maybe he is smart. He wants to take our fish." He come in too close and he was full speed all the time. When we got through circling around we got everything all ready—the people in the skiff and another guy in the bow. When

(Testimony of Salvatore Carnevale)

we was all ready the Gloria R pass us full speed, close to us and never slow down. When he was about half the boat past us he turned the wheel around at once and hit us in the bow and he broke a couple of pieces of board alongside of the front and throw it on one side.

Mr. Lande: May the record show the witness indicates the stem and bow of the vessel as being turned to the right?

The Witness: Yes.

The Court: Did you strike the Gloria R or did the Gloria R strike you?

The Witness: He struck us because he go full speed and we go slow and he tried to get our fish. He come right close.

Q. By Mr. Lande: Right before the boats came together? A. Yes.

Q. How fast was the Bessemer going?

A. Bessemer, he go slow, because he circle around, because we have got to set. We can't go fast and set. If we make it fast we can't set. [64]

The Court: How slow were you going?

The Witness: Oh, maybe a mile or mile and a quarter, something like that. No give it the power.

The Court: Were your nets in the water?

The Witness: No. We have got two guys on the skiff all ready to set.

The Court: How long have you been fishing?

The Witness: Close to, about two years.

The Court: When do they put the red light on the mast?

The Witness: Just when we start to set.

The Court: When you start to set the net?

(Testimony of Salvatore Carnevale)

The Witness: Yes.

The Court: You do not put it on before that?

The Witness: Lot of times they do it before. Sometimes, you know, just do it because other boats pass by and you think they pass on top of the nets and cut the nets.

The Court: I did not understand that.

Mr. Lande: He said a lot of times they put the red light on ahead of time so as to scare the other boats away, so they won't come too close because they are afraid they will cut the nets. They sometimes put the light on ahead of time.

Q. During the time you have been in San Pedro has it been the custom there that you put the red light on when the nets are ready to go in the water and you are starting to lower [65] the net?

A. Yes, when—there are lots of boats too close you put the light on, but if there are only one or two boats you don't put the red light up before—just when we start to set.

Q. When you actually start to put the nets in the water? A. Yes.

Mr. Lande: I have no further questions, your Honor.

Cross-Examination

By Mr. Toner:

Q. Mr. Carnevale, didn't you just say that you put the red light on when you are ready to set?

A. Yes.

Q. When you are ready to set? A. Yes.

Q. And what is the purpose of the red light? Why do you put the red light on?

A. So they won't cut the nets.



(Testimony of Salvatore Carnevale)

Q. So that other boats will stay away?

A. Yes.

Mr. Lande: He said so they would not cut the nets; so the other boats would not come close and run through the nets and cut them.

The Witness: Yes. [66]

Q. By Mr. Toner: However, you did make the statement that when you are ready to put the net in the water you put on the red light? A. Yes.

Q. Now, where were you? On top of the pilot house?

A. Yes.

Q. On top of the pilot house? A. Yes.

Q. What light did you see on the Gloria R?

A. What light I see?

Q. Did you see the red light or green light or both?

A. When he passed by I saw the green light.

Q. You saw the green light?

A. Yes. He go straight across to San Pedro.

Q. You saw the green light on the Gloria R?

A. Yes.

Q. And before that did you see any other lights?

A. No, I can't see the other light. When he turned I see the red light because he make a turn.

Q. And you were making a starboard circle, were you not? A. Yes, sir.

Q. And just before the collision you saw the green light? A. Yes. [67]

Q. And at the time of the collision—

The Court: Which light would the Bessemer have that would be visible to the Gloria R?

Mr. Lande: The red light—that would be the left light.

(Testimony of Salvatore Carnevale)

The Court: Would they be going in the opposite direction?

Mr. Lande: The rules of the road are, your Honor, that when you are red to red or green to green then you are in a passing position. Then if either boat desires to change its course they turn in back of it just like an automobile. You do not cut in front of a fellow.

Now, where you see red to green or green to red, that means a converging position and then the boat that has altered its course, they know at that time a collision is probably imminent.

The Court: Under such a setup wouldn't both boats be well advised that they were in danger?

Mr. Lande: Oh, yes.

Mr. Toner: If the court please, the testimony was that the Bessemer made a turn to the starboard like this. Now, that would automatically change the position of the red and green light from that situation.

Mr. Toner: The Gloria R is coming this way with her green light here and her red light there. [68]

The Court: According to the libelants' diagram the Bessemer had made a circle one way and then it made a circle the other way—

Mr. Lande: And then he said he was going straight ahead preparing to lower the net at about that time.

The Court: But he just made a turn.

Mr. Lande: He had completed his turn.

The Court: He was changing his course, was he not?

Mr. Lande: He completed his turn at that time and this boat here, which had circled on the outside, came to him and they were at this position here. They were both red to red.

(Testimony of Salvatore Carnevale)

The Court: And both of them changed their courses?

Mr. Lande: No. After he saw they were red to red he maintained his course, but the Gloria R swung in front of him and then skidded into his bow as he came too close to the front of it. In other words, just like you are driving down a slippery street and you turn too close in front of a fellow and your rear end skids and you hit him in the front. That would be comparable.

The Court: Proceed.

Q. By Mr. Toner: Now, when you saw the Bessemer, when you saw the Gloria R's red light, where on the Bessemer did you see it? In other words, what was the bearing to the Bessemer when you saw the green light?

A. First we was two or three hundred feet apart when [69] we make a turn and we see the boat—he pass in front like that. You see both the lights, this side and the other side when you are in front. If you make circle again you will be over here, see like that, and he come straight across. All the time he come straight across. We slow down because we have got to set when he is ready. When he is ready to set the boat is right alongside of us and we pass like that, and when he was right in front, about half way, he turned all at once and he hit us about like that.

Q. That was the only turn the Gloria R made, was that turn to the port immediately before the collision?

A. Yes, he turned when he hit us.

Q. That is the only turn he made?

A. That was the only turn he made.

Q. And then at that time the Bessemer was in this starboard circle? A. Yes.

(Testimony of Salvatore Carnevale)

Q. And so you were turning all the time?

A. Yes.

Q. And the Gloria R was coming along here straight?

A. Yes.

Q. And did not turn until just before the collision?

A. Yes.

The Court: Counsel, I do not understand Anthony Gloria R's testimony, because he indicated that he made a circle [70] and said that he took a course that would take him to San Pedro.

Mr. Toner: Yes.

The Court: And that is the way he set his course.

Mr. Toner: Yes.

The Court: And that he continued on his course. Now, according to his own chart he did not change his course after he set it for San Pedro.

Mr. Toner: That is correct. That is what this witness testifies to, that the Gloria R was on a straight course and the only turning was immediately before the collision. And that is what he testified to—that in order to avoid the collision at the last moment there was a turn to the port, but there was no previous turn, to try to explain this change of red to green as testified by Anthony Bessemer.

The Court: Any further questions?

Mr. Toner: That is all.

Mr. Lande: Just a minute.

#### Redirect Examination

By Mr. Lande:

Q. Mr. Carnevale, did you see the Gloria R make the big circle around you?

A. No, I didn't see him make a circle.



(Testimony of Salvatore Carnevale)

Q. You did not happen to see that?

A. No, sir. [71]

Q. Now, this turn that the Gloria R made to the left there, was that before she hit you or as she hit you or after?

A. No, when she hit she turn and hit us like that.

Q. He turned and then he hit you?

A. Yes, sir.

Q. He turned and then he hit you?

A. Yes, sir.

Q. And how fast was he going when he turned and then hit you?

A. Full speed, about eight miles an hour.

Q. When you were up in the pilot house there, the wheel house, were you on the port or the starboard side?

A. No. I was on the side we got hit on, the port side.

Q. You were on the red side. A. Yes, sir.

Q. When you were on the red side there that would be on the port side down here. Did you see his red light some time before the collision? A. Yes.

Q. When he was some way off?

A. Sure. When he was a little far you see it, but when he is close you see the green—that is all, because he pass close here, you see.

Q. In other words, you first saw his red light?

A. Yes. [72]

Q. And then you saw his green light?

A. Yes.

Mr. Lande: That is all.

Mr. Toner: That is all.

The Court: As I understand it, as far as the Respondent is concerned, the claim is they made a circle and then adopted a course that headed toward San Pedro.

The Libelants' chart would indicate that when they completed the circle they started east and then turned almost directly north, is that not true?

Mr. Lande: Yes, cut right in front of him, your Honor.

The Court: In other words, the picture would appear, according to the testimony of the Libelant, that the Respondent was paying no attention to Libelants' vessel, and cut right in front of him.

Mr. Lande: That is it precisely.

The Court: While the Respondent's chart makes it appear, and it is also corroborated by the last witness, the he was going in a northwest direction.

Mr. Lande: The last witness, your Honor, said he saw the red light. He said he was stationed over here and that he saw a red light over here. In other words, which would place this vessel over here in this position here and that he saw the green light after the Gloria R had turned and at the [73] time of the impact, but before then, before the impact, he saw the red light. In other words, he was on the red side and he saw the red light of the other boat.

Mr. Toner: I do not think counsel can avoid the statement that the Gloria R did not turn until just before the collision. That is what this last witness testified.

Mr. Lande: It was just before the collision, but it is a question of what you call "just before" he turned. Even their position here shows that they were crossing the bow of the Bessemer. Even in this position here it shows

the Gloria R crossing in front of him. Why didn't he come around here and avoid them. That would have been the simplest thing and it would have avoided the accident, but instead he chose to come so close that we have the collision occurring.

Your Honor will see the circle here of the Bessemer. It is the same as the circle here only this fellow drew a complete circle. So, we have them agreeing on the greater counter-clockwise circling of the Gloria R.

Now, we have also got them agreeing that the Bessemer was in her circle around the fish and we have one boat on the outside seeing the other boat on the inside.

The Court: All right, call your next witness. [74]

JACK OLSEN,

called as a witness by and on behalf of the Libelants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Jack Olsen.

Direct Examination

By Mr. Lande:

Q. Where you you reside, Mr. Olsen?

A. San Pedro.

Q. And what is your occupation?

A. Engineer.

Q. Are you employed on fishing vessels?

A. Yes.

Q. How long have you been going to sea?

A. Oh, practically 40 or 41 years.

Q. And during that time what type of vessels have you sailed on?

A. All types—from the biggest to the smallest.

(Testimony of Jack Olsen)

Q. How long have you been working on fishing vessels?

A. Off and on, I should say, about 20 or 25 years.

Q. Now, when a fishing vessel is out to sea before the set is made, are you in the engine room or outside?

A. Well, sometimes I am in the engine room. Most of the time I am on deck.

Q. Now, on October 4, 1944, were you engineer on the [75] Bessemer?

A. Yes, sir.

Q. About nine o'clock that night, before the collision happened, whereabouts were you?

A. I was standing aft amidship, alongside of the hatch, on the port side of the vessel.

Q. All right. Now, will you step to the Libelants' diagram here and will put an X with my pen where you think you were just at the time—just about where you were standing?

A. I was standing just about right there.

Q. I will draw an arrow and label it "Olsen."

The Court: All right.

Q. By Mr. Lande: Now, Mr. Olsen, what was the condition of the visibility?

A. Very good.

Q. At that time?

A. Very good.

Q. Was it moonlight?

A. Moonlight and very good visibility. You could see for miles. Well, I will say you could see a dark—you could distinguish a dark object at night about five miles or six miles:

Q. All right. Now, you came on deck that night?

A. Yes. [76]

Q. Now, you were on the port side along about midships?

A. Yes, sir.



(Testimony of Jack Olsen)

Q. Now, did you see any other vessels?

A. Other vessels than the Bessemer?

Q. Yes. A. Yes; I saw the Gloria R.

Q. Now, where was the Gloria R when you first saw her? A. She was passing around our stern.

Q. And what light did you see on her?

A. When she passed around our stern?

Q. Yes.

A. Green light. They was outside of the—we were between her and the Island.

Q. You were between her and the Island?

A. Yes. That was when I first saw her.

Q. All right. Now, did you see her again?

The Court: Just a moment. Were you between the Gloria R and the Island?

The Witness: Yes.

The Court: I understand now.

The Witness: We were between her and the Island at the time I first saw her.

Q. By Mr. Lande: Did you see her again?

A. Yes. I saw her inside of us, between us and the Island. [77]

Q. And there was some difference of time between those two positions?

A. Yes, quite a bit of time.

Q. About how long?

A. I could not say—maybe fifteen minutes.

Q. Could have been more?

A. Could have been more.

Q. All right. Now, the second time you saw her between you and the Island? A. Yes.

(Testimony of Jack Olsen)

Q. And what light did you see on her then?

A. Red.

Q. You saw her red light? A. Yes.

Q. All right. Did you notice at what speed she was traveling?

A. Well, at that distance I could not say. Looked like she was going full speed to me.

Q. Now, at the second time you saw her what was your vessel doing?

A. Going in toward the Island.

Q. You were headed in toward the Island?

A. Yes, sir.

Q. And about how fast were you going?

A. Oh, we were going just at dead slow. [78]

Q. How many knots an hour?

A. Around one or one and a half.

Q. Now, at any time from that time up to the time of the impact did your speed increase or decrease?

A. Didn't increase or didn't decrease anything until we throw the clutch out.

Q. Now, you say you saw the red light of the Gloria R the second time when the Gloria R was between you and the Island? A. Yes.

Q. All right. Now, did you watch the Gloria R after that?

A. Yes. I saw her again when she passed around our bow.

Q. Now, tell the court just what you saw of it and what happened from the second time you saw the Gloria R light up to the time of the collision?

A. Well, I saw the Gloria R come around our stern and went past our bow and I was standing on the port side of the vessel and I saw her red light.

(Testimony of Jack Olsen)

Q. I asked you from the second time. You started out giving your position the first time. You said you saw her come around your stern. That was the first time? A. Yes.

Q. Now, I am asking you after you saw her go around [79] your stern and make the circle around you, you saw her the second time between you and the Island?

A. Yes, sir.

Q. What did you see after that?

A. I saw the Gloria R coming towards us—that is, the red light coming toward us. I could not say it was the Gloria R, but there was no other boat there and I saw the red light and I turned around to the man standing by the skiff painter there to let go the skiff and I said to him, "I think we got a good school of fish here; I think we get a good load, and I turned around again and looked ahead and there was this green light right in front of me, right in front by the boat, so I turned around and I hollered to the gang, "Better brace yourself, we are going to hit and hit hard," and I heard the skipper holler up in the mast and then I heard the engine going in reverse full speed, so I braced myself too. I grabbed a hold of the hatch to hang on, but the impact wasn't as hard as I expected it to be because our boat was pretty near stopped.

The Court: How must time elapsed between the time you saw the red light and the time you saw the green light?

The Witness: Oh, I should say approximately, maybe one or one and a half or two minutes time. Time flies when you are talking to a person. You don't pay no attention to it. I could not say exactly. [80]

(Testimony of Jack Olsen)

The Court: But it was a short time?

The Witness: Yes, a very short time.

Q. By Mr. Lande: Now, did you see the impact between the two vessels?

A. No, not actually the impact. I did not see it because the house obscured the view from me where I was at on the deck.

Q. Did you feel your vessel move?

A. Yes, I felt the impact all right.

Q. Now, tell the court what you felt? How did it seem?

A. Well, the boat took a little list for one thing. You can feel the jar. I felt the jar.

Q. Which way did it take a list?

A. To the starboard.

Q. That is to the right? A. Yes.

Q. Now, right at the moment of the impact—strike that. Before the other boat hit you—before the boats came together could you hear the clutch go out?

A. Yes.

Q. That can be heard on deck?

A. Yes, you can hear it.

Q. And the clutch is controlled from the wheel house, is that right? [81]

A. That is correct.

Q. You heard the clutch go out? A. Yes.

Q. You heard it go in reverse?

A. Very much so.

Q. Could you tell from the sound of the gears and engine whether or not your boat was in reverse?

A. Yes; you can feel that any place on the boat.

Q. And you heard it go in reverse before the impact?

A. Yes.



(Testimony of Jack Olsen)

Q. How fast do you think your boat, the Bessemer, was going at the time that you felt the blow?

A. Well, not very fast. I would not say. I don't think it was a quarter of a mile. She wasn't quite stopped.

Q. How much of the Gloria R passed in front of your boat before the impact occurred?

A. Well, that would be—she was about amidships on her.

Q. Could you see?

A. No, I couldn't see from where I was standing at the time. I saw it afterwards.

Q. Could you see the front—that is, the front of the Gloria R pass in front of you before the impact occurred?

A. I saw it just before the impact. Yes, she was on the port side then. [82]

Q. She was?

A. From my position on the boat I could only see so far on account of the house in front of me.

Q. You were looking ahead, weren't you?

A. Yes.

Q. Now, from where you were looking ahead did you see the Gloria R pass in front of you?      A. Yes.

Q. And you saw it pass in front of you for a matter of split seconds, but for some time before the impact occurred?      A. Yes.

Mr. Lande: You may cross-examine.

Cross-Examination

By Mr. Toner:

Q. Mr. Olsen, you stated that you saw the red light of the Bessemer?      A. Of the Bessemer?

Q. I mean the Gloria R?      A. Yes.

(Testimony of Jack Olsen)

Q. And then you turned around and spoke for a minute or so to one of the fellow crew men?

A. Yes, sir.

Q. And then you looked up and you saw the green light of the Gloria R? A. That is correct. [83]

Q. Did you ever seen both the red and the green lights together?

A. That just depends on the distance you are away from the vessel.

Q. At this particular time?

A. No, you could not.

Q. You did not? A. I was too close.

Q. You did not see the red and green of the Gloria R at any time—at the same time? A. No.

Q. First you saw the red? A. Yes.

Q. And then there is a lapse and then you saw—you saw it for a minute or two minutes? A. Yes.

Q. And then you saw the green? A. Yes.

Q. But you did not see them simultaneously?

A. No.

Q. Now, at the time you are speaking of was your boat in a starboard circle around the fish?

A. Well, that I could not say for sure because I paid no attention. I was looking at the fish.

Q. When you are circling fish the entire crew is very [84] much interested in the size of the school?

A. Sure.

Q. Because that means money in your pocket?

A. Yes, you bet.

Q. So you are very definitely interested?

A. Yes.

(Testimony of Jack Olsen)

Q. And so is all the other crew interested in the size of the school?

The Court: Gentlemen, it is 12 o'clock and we will take our noon recess at this time.

Mr. Toner: I have only one question and then I will be through.

The Court: All right.

Q. By Mr. Toner: You state that your vessel was in a forward motion at the actual time of the impact?

A. Well, so far as I could judge by the time that elapsed and we were in reverse—it is bound to be a little forward motion because we did not have time enough from the time of reverse until the boat stopped.

Mr. Toner: That is all.

The Court: That is all. We will take our noon recess at this time until 1:30.

(Whereupon, at 12:00 o'clock noon, a recess was had until 1:30 p. m. of the same day.) [85]

Los Angeles, California, Thursday, May 16, 1946  
1:30 P. M.

JACK OLSEN,

called as a witness by and on behalf of the Libelants, having been heretofore duly sworn, resumed the stand and testified further as follows:

Redirect Examination

By Mr. Lande:

Q. Mr. Olsen, this morning you testified, I believe, that the very first time you saw the Gloria R she was about a mile and a half or so away from you, circling around you, and you saw her green light. Is that right?

A. No, I was mistaken in that.

(Testimony of Jack Olsen)

Q. Tell the judge what you saw?

A. I saw the red light.

Q. Tell the judge what the correct statement is?

A. It should be red.

Q. And that was the first time you saw her.

A. Yes.

Q. Then you next saw her about 15 or 20 minutes later?     A. Yes, sir.

Q. The second time you saw the red light did you continue to see that light for any length of time?

A. Yes, for quite a while. I could not say exactly the time. Maybe three or four or five minutes. [86]

Q. Then you turned around and you were talking to some men there?     A. Yes.

Q. And which way were you facing when you were talking? I mean, were you facing out to sea or toward the boat or what?     A. Aft.

Q. Facing aft?     A. Yes.

Q. Then it was when you turned around after that that you saw the green light?

A. Yes, that is correct.

Q. Now, will you explain to the judge please, how a boat pivots when it is given a rudder to the right or to the left? In other words, how does a single screw boat turn, which is what the Bessemer was, wasn't it?

A. Yes.

Q. A single screw boat. Take a pencil or some object and show the judge how it pivots when it is given a hard rudder?

A. The rudder hard over forces the stern—say you want to swing to starboard, it forces the stern to port like that and the bow hardly swings at all.



(Testimony of Jack Olsen)

Mr. Lande: Of course the record does not show what he means by "by that." You mean you just showed us that when [87] you give the rudder to the right or left the stern moves to the right or left and the pivoting is at a point somewhere near the bow?

A. Yes, that is correct.

Mr. Lande: That is all I have, your Honor.

The Court: Any further questions?

Mr. Toner: I think that is all, your Honor.

Mr. Lande: That is the case of the Libelants, your Honor. Do you wish us to go ahead on the other issues?

The Court: Have you any additional matter on the question of liability?

Mr. Toner: Yes, I have some of the crew here.

The Court: Let us hear from them.

Mr. Toner: If the court please, this man has some trouble with the English language. I had planned to have an interpreter here but was unable to get one.

The Court: I am not able to understand Italian. It is up to counsel to provide an interpreter.

Mr. Toner: I talked to Mr. Lande and it is agreeable with him that we use one of the members of the crew. Is that correct?

Mr. Lande: You can use my captain.

Mr. Toner: Will that be satisfactory to the court?

The Court: Yes.

Mr. Lande: But it is a little unusual. [88]

Mr. Toner: It is rather unusual.

Mr. Lande: You can use my captain. It is perfectly agreeable with me. I am sure he will do it accurately for the court.

The Court: Very well, swear him as an interpreter.

Anthony DiLeva (Boat Bessemer) was thereupon duly sworn to interpret from the English into Italian and from the Italian into English.

BIAGO CUMMO,

called as a witness by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Biago Cummo.

Direct Examination

By Mr. Toner:

Q. What is your address? A. 383 9th Street.

Q. And you were a member of the crew of the Gloria R on October 4, 1944? A. Yes.

Q. Now, where were you on the Gloria R at the time of the collision? A. I was at the wheel.

Q. And is the wheel in the pilot house? [89]

A. On top of the pilot house.

Q. And Anthony DiLeva (Gloria R) was in the crow's nest? A. On top of the mast.

Q. And Jack Conpaglasi was lookout at the bow?

A. Yes.

Q. You made a large circle.

The Court: There is no dispute about making a large circle, is there, counsel? Why don't you ask the witness what he saw of the accident and let him explain it, and

(Testimony of Biago Cummo)

then you can ask a few questions about the lights and so forth.

Q. By Mr. Toner: Now, Biago, starting from the time you were at the easterly end of the Island, will you explain to the court what you did and what happened that night?

The Interpreter: He saws after we got to the east end he turned to go back to Avalon again.

Q. By Mr. Toner: And then after he turned to go to Avalon what was his course?

A. It was out—we go inside.

The Interpreter: He said he went around this and then he come—

The Court: Just a moment. I think I made a mistake in suggesting that he tell his story. Ask him definite questions and get the answers.

Q. By Mr. Toner: When you were at the easterly end [90] of the Island did you turn toward San Pedro?

A. We stay east of the Island—turned for the fish. Turned outside Avalon. The moon come up one hour already. We stay out—outside of Avalon. We take a course northerly—northerly by northwest a little bit and we go straight. We see the other boat got a green light.

Q. You saw another boat that had a green light on it?

A. Yes, this boat.

Q. And how far off was that boat?

A. About a couple hundred yards maybe. About a quarter of a mile we see the boat.

Q. About a mile?

A. Quarter of a mile we see the green light.

(Testimony of Biago Cummo)

Q. And where was the green light with reference to your boat?

A. This side on the bow. We are going east. We are going straight. We go straight for San Pedro and we see the green light on the bow.

Mr. Toner: Don't argue with him.

The Interpreter: I don't want to argue with him. I want this man to interpret. He thinks I am arguing. Let his man argue with him.

The Court: You don't have to do any arguing. .

The Interpreter: He argues with me. He thinks I am trying to change his story. [91]

The Court: Very well, if you want to swear the Respondent you may do so.

Anthony DiLeva (Boat Gloria R), was thereupon sworn as an interpreter to interpret the English into Italian and Italian into English.

The Clerk: State your full name.

The Interpreter: Anthony DiLeva.

Mr. Lande: May the record show this is the Anthony DiLeva from the Gloria R?

Mr. Toner: Yes.

Mr. Lande: Who is now acting as interpreter?

Mr. Toner: Yes.

Q. By Mr. Toner: Now, start from when you set your course toward San Pedro and tell the court what happened. Give him that.

The Witness: Went a little bit northwest.



(Testimony of Biago Cummo)

Q. What happened then?

A. We see the boat on the bow got green light.

Q. You saw the green light? A. Green light.

Q. Of another boat?

A. We see the boat got green light. We go north by northwest.

Q. And how far off was that boat?

A. Maybe a quarter mile. [92]

Q. And was that boat off your port bow or directly ahead or what?

A. It is going east. We try to pass on the stern. We see all the time the green light. We seen green light and red light. I can't turn around to my right, see. This is what he was doing. We going straight. We see green light and red light both and he holler. All of a sudden I heard hollering from the pilot house. The boat back up, see. It is going fast. We move the wheel here too close.

The Interpreter: He says when the Bessemer got close, just when the boats were about to hit, he says he heard the crew of the Bessemer hollering, the man on the pilot house, and he says as soon as they hit the boat, the boat was going in reverse—his boat. He says when they hit the boat was going astern full speed but that was after they hit.

Q. Now, when the Bessemer hit the side of the Gloria R—

Mr. Lande: I object to that as leading.

The Court: He will have to lead this witness. You cannot get this testimony without leading. The objection is overruled.

(Testimony of Biago Cummo)

Mr. Lande: He is assuming a fact not in evidence. I do not recall hearing this witness testify which boat struck the other. He said they came together.

Mr. Toner: After all, what we are trying to do is get [93] the facts.

Mr. Lande: Let us hear them from the witness and not from you.

The Court: The court permitted you to lead the witness but as soon as opposing counsel starts to lead the witness you complain about it.

Mr. Lande: I am not complaining about the leading. I complain merely about the fact in this particular question. It seemed to me, and I may be mistaken, as to whether or not this man so testified, but it seemed to me he had not testified as to which boat hit the other and this question that he put to him, the objection should not have been that it was leading.

The Court: There is no argument as to how the boats collided as far as the evidence is concerned. There is no particular conflict here as to how the boats came together. What I am trying to determine is just how these boats came together under those circumstances.

Q. By Mr. Toner: Did the Bessemer hit the Gloria R? A. The Bessemer hit us.

Q. When the Bessemer hit the Gloria R was the Bessemer moving forward or backward?

The Interpreter: He says the Bessemer was going ahead when they hit him.

Q. And when the Bessemer was proceeding on an easterly direction and you saw her green light, was she ahead of you? [94] Was she forward of you?

(Testimony of Biago Cummo)

The Interpreter: He says the boat was ahead of him.

Q. And did the Bessemer cross your course?

A. The Bessemer passed in front of my course.

Q. And after the Bessemer passed in front of your course did the Bessemer make a turn?

The Interpreter: He says "Yes, the boat turned to us."

Q. And what kind—

The Court: That is different from the testimony of the skipper.

Mr. Toner: I have to take this witness as I find him.

Q. And did the Bessemer make—you said the Bessemer made a turn. What kind of turn did the Bessemer make? To port or to starboard?

A. On the green light.

Q. He made a turn on the green light?

A. On the green light.

Q. To the right?

A. To the starboard. That would be the right.

Q. On the green light like this?

The Interpreter: He said the boat turned to the starboard, to the right.

Q. Toward the green light? A. Yes.

Q. Now, if the Bessemer had not made this turn to the [95] green light or turned to the starboard, would you have cleared the stern of the Bessemer?

A. You know this boat he come around—

The Interpreter: He says, "Well, if he would have kept on his course—" You ask would the Bessemer have cleared this boat and he says, "Yes, yes, we would have cleared the Bessemer, too."

(Testimony of Biago Cummo)

Q. You would have passed to the stern of the Bessemer?      A. Yes.

The Interpreter: He said he would pass the stern of the Bessemer.

Q. And the Bessemer was then proceeding when you first saw her in an easterly direction?

The Interpreter: He says, "Yes"; that he was laying east—that is why he could see his green light.

Q. Going east?      A. Laying east.

Q. Was the boat headed in an easterly direction?

A. Yes.

And this starboard turn caused the Bessemer to head in a westerly direction, is that it?

A. Sure, he turned around.

The Interpreter: He says he was laying east when he turned west—turning west, that is how he hit them.

Q. Was this turn that the Bessemer made on a semi-circle? [96]      A. Half a turn.

The Interpreter: Half a turn is what he said. I asked if the Bessemer made a turn and he said, "When I saw the green light I saw him turn. We saw the green light and the red light this way. He turned."

He says while he is making the turn he hit the Gloria R. That is when he spotted both of the running lights, the red and green when he was coming onto him. That is what he said.

Q. Now, where on the Gloria R did the Bessemer strike?      A. Strike at the mast.

Q. You call that amidships?      A. Yes.

Q. On the Gloria R is there a switch to turn on the red mast light?

The Interpreter: Yes, there is a switch.



(Testimony of Biago Cummo)

The Court: You are not supposed to answer the questions.

Q. By Mr. Toner: Ask him the question.

The Interpreter: He wants to know if he had one.

The Witness:: Sure, we got it.

Q. By Mr. Toner: And what is the purpose of that masthead light?

A. Well, put the red light on top of the mast when you are on the fish, when you see the fish, the school of fish, then you light the red light and turn around on top of the [97] fish.

Q. Why do you put on the red light?

A. So some other boat—for the other boats.

The Interpreter: He means some other boat can see them.

Q. By Mr. Toner: Some other boat what?

The Interpreter: You put the red light on for boats that are coming towards you, to warn them you are on the fish. You got your red light on to tell them to stay away because you are on the fish.

Q. When do you put on the red light?

The Interpreter: He says when you get on the fish.

Q. Before you put your net out?      A. Sure.

Q. And is that the custom around San Pedro?

A. Well, that is the fishing regulation at San Pedro.

Q. Was there any red light on the masthead of the Bessemer?      A. No.

The Court: The Libelant does not claim there was.

Mr. Toner: I wanted to establish that.

The Court: They admit it.

Q. By Mr. Toner: Now, between the time you left the east end of Avalon and the turn you made within a

(Testimony of Biago Cummo)

couple of seconds did you make any change in your course? A. No, no, no change of course. [98]

Q. When did you first change your course prior to the collision?

The Interpreter: You want to know if he changed his course when they were about to hit?

Mr. Toner: That is the question.

The Court: Gentlemen, I have put up with just about as much of this as I am going to. I am not blaming you. I am not blaming anybody; but I am not going to have this kind of a situation. I have sat here and witnessed a procedure that this court is not going to tolerate. If you people cannot secure an interpreter I cannot pay any attention to this testimony. There is a dispute here even as to the questions that are asked and they are all interested parties who are acting as interpreters. It is not satisfactory. I shall not consider this testimony of any value one way or the other.

Mr. Toner: If the court please, the important thing that this witness can testify to is the lack of a change of course between the time he left the easterly end of Catalina Island until—

The Court: I cannot understand his testimony; but simply because he adopts a course that does not give him the privilege of running into another boat.

Mr. Toner: Of course not.

The Court: I understand his testimony relative to that, but this method of interpreting in a case and conducting a [99] trial is not going to be tolerated.

Mr. Toner: I appreciate that it is rather unsatisfactory.

(Testimony of Biago Cummo)

The Court: There are plenty of Italian-English interpreters you could obtain. They are not difficult to obtain. There are plenty of disinterested parties who could have been called here as interpreters in this case.

You have an argumentative witness and you have an argumentative Libellant on one side and an argumentative Respondent on the other side.

Mr. Toner: May I proceed, if the court please, with this interpreter by asking just a few questions?

The Court: Proceed.

Q. By Mr. Toner: Just before the collision did you make a turn to port? Now you interpret that—may this be off the record, please?

The Court: Yes.

The Witness: No.

Q. By Mr. Toner: Immediately before the collision I am referring to?

A. No. Going straight northwest—north by northwest.

Q. And you made no turn?      A. No.

Q. At all?

A. No, because the boat pass already.

Q. Did you try to avoid the collision? [100]

The Interpreter: Well, he said he tried. He says he already figured they had passed the stern of the Bessemer. He said he figured he passed the Bessemer's stern already.

Mr. Toner: I think that is all.

Mr. Lande: No questions.

NICOLA CURCI,

called as a witness by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Nicola Curci.

Direct Examination

By Mr. Toner:

Q. Where do you live. A. 8th Street.

Q. What is the address? A. 545.

Q. San Pedro? A. Yes.

Q. Were you on the Gloria R at the time of the collision on October 4, 1944? A. Yes.

Q. And where on the boat were you?

A. On the boat what?

Q. Where were you on the Gloria R? [101]

A. Alongside Biago on the pilot house.

Q. When you started toward San Pedro what course did you follow?

A. The moon came up early and the skipper says, "Not enough fish." He says, "We better go home," and he is going north by a little bit west just to San Pedro.

Q. Did you see the lights of any other ship?

A. I see the green light about three-quarters of a mile out off of the Gloria.

Q. Ahead of the Gloria or to one side?

A. The other boat I see the green light—that is, the Bessemer.

Q. Was that ahead of the Gloria R?

A. Bessemer ahead of the Gloria R.

Q. You saw it about three-quarters of a mile away?

A. Yes.



(Testimony of Nicola Curci)

Q. What direction was it going?

A. The Gloria R?

Q. The Bessemer?

A. He is going little bit, I think, east.

The Court: East?

Mr. Toner: Yes, a little bit east.

Q. And as the two ships—as the two fish boats approached what happened then?

A. What happened then. We going right to San Pedro and [102] the Bessemer he come in—

Q. The Bessemer come into the Gloria, is that what you said?

The Interpreter: That is what he said.

Q. By Mr. Toner: The Bessemer came into the Gloria R? A. Yes.

Q. And hit the Gloria R?

A. Hit the Gloria R.

Q. And was the Bessemer making a turn?

A. No, going straight.

Q. The Bessemer was going straight?

A. Yes.

Q. And went into the Gloria R? A. Yes.

Q. Was the Bessemer on the fish?

A. Yes, he is on the fish.

Q. And was he making a turn on top of the fish?

A. He make one turn, see, on top of the fish. He make one turn on top of the fish. Maybe find no more fish and he started to run again.

Q. Now, what direction was the Bessemer headed in when it collided with the Gloria R?

A. I don't understand what you mean.

(Testimony of Nicola Curci)

Q. When the collision happened what direction was the Bessemer headed in, when the two boats came together? [103]

A. Right through the kitchen and the mast.

The Court: The question was, what direction was the Bessemer traveling. And according to the witnesses here they are almost in accord on that. They said the Bessemer was headed in a westerly direction.

Q. By Mr. Toner: Was the Bessemer headed west at the time of the collision? A. Yes.

Q. Now, did the Bessemer have any mast light on?

A. No.

Q. What lights were on the Bessemer?

A. Just the green light.

Q. The running lights?

A. Yes, running lights—that is all.

Q. Green light on the starboard and red light on the port? A. Yes.

The Court: I do not understand the significance of the red and green lights as well as you people; but assuming that the Bessemer was headed in a westerly direction and the Gloria in a northwesterly direction, that is, going toward Catalina Island, which light would be visible from the south:

Mr. Toner: Which light of the Bessemer, your Honor?

The Court: Yes.

Mr. Lande: The left light or red light. [104]

The Court: You are talking in a language that is rather difficult for me to follow.

Now, according to each of these diagrams the Bessemer was headed toward Catalina Island?

(Testimony of Nicola Curci)

Mr. Lande: Yes, sir.

The Court: And the Gloria R was approaching her going in a northwesterly direction?

Mr. Toner: Yes.

The Court: Now, as they approached which side of the Bessemer would have the red light?

Mr. Lande: The left side or south side.

Mr. Toner: Red light on the left side and green light on the other side.

Q. Now, as the Bessemer was ahead of the Gloria R, if the Bessemer was ahead of the Gloria R, and in this position, if the court please, the green light would be visible on this side and the red light would become visible only when she turned into that position?

The Court: I understand that part of it.

Mr. Toner: There is a catch phrase that identifies the lights by this means—it says “Red-left-port.”

The Court: I understand that but I cannot keep it in mind, but you may proceed.

Mr. Toner: You are familiar with the San Pedro custom with reference to a masthead light? [105]

A. San Pedro custom—masthead light? Well, when you are not on the fish—

Q. Just answer whether you are familiar or not. Do you know the custom? A. Yes, sir.

Q. What does the custom mean?

A. The custom—you have a red light on top of the mast. It means danger, you see, you better look out, you better go away.

Q. And when do you put on the masthead light?

A. Well, sometime you—when you are on top of the fish. Sometimes you may be on top of the fish and you run the boat about a half hour sometimes with it on.

(Testimony of Nicola Curci)

Q. Was there any red light on the Bessemer?

A. No.

Mr. Toner: That is all.

The Court: Just a moment. Did you see a red light at any time on the Bessemer?

The Witness: No, sir.

The Court: That is all. All you ever saw on the Bessemer was the green light?

The Witness: That is all.

### Cross-Examination

By Mr. Lande:

Q. Isn't it true it is also part of the custom just [106] to put the red light on just as you lower the net?

A. That is the law. The law is you have got to have a red light on top of the mast.

Q. When the net is being lowered?

A. (No answer.)

The Court: Any further questions.

Mr. Lande: I am trying to think, your Honor, whether I have anything further.

Q. After you made your big turn around here and you came back to the Island and started out toward San Pedro, were you going home, is that right?

A. Yes.

Q. You were not circling for fish then, were you?

A. No.

Q. And you did see the Bessemer circle for fish, didn't you?

A. Yes, sir.

Q. What?

A. I see one time stop. I don't know find fish or not.



(Testimony of Nicola Curci)

Q. But you saw her at least make one circle?

A. Yes, sir. I don't know if she find the fish or not.

Q. You could have just as well steered your boat a quarter or a half a mile from where the Bessemer was, couldn't you?

A. About three-quarters of a mile. [107]

Q. And from that three-quarters of a mile you went up to where the Bessemer was, didn't you?

A. Went right through to San Pedro.

Q. And you went about eight knots an hour?

A. About seven or eight knots an hour.

Mr. Lande: That is all.

The Court: That is all.

Mr. Toner: That is all I have on the liability phase.

Mr. Lande: Anthony DiLeva of the Bessemer, will you take the stand?

ANTHONY DiLEVA (Bessemer),

called as a witness by and on behalf of Libelants, having been previously duly sworn, was recalled and testified further as follows:

Direct Examination (Resumed)

By Mr. Lande:

Q. Tony, when did the sardine season start in the fall of 1944?

A. Well, usually start October 1st but it happened that the full moon fell on October 1st and you don't fish for a period of five or six days. You don't fish on the full moon, so we start about the 4th, which was the first day.

(Testimony of Anthony DiLeva—Bessemer)

Q. Did you take on your crew before then?

A. Yes, I did.

Q. Now, is there a custom and practice in San Pedro [108] as to the hiring of crews at the beginning of a season?

A. Oh, yes, you hire them.

Q. Explain to the Judge what the custom is when you hire a crew?

A. Well, you hire—usually hire the crew before the season and they help you make the nets and fit the boat for sardines and that is all there is to it. Then you hire them for the whole season. Then they can quit any time they want, but you can't fire them during the season, or you get sued for their pay, for their share of the season.

The Court: Let me ask you this: Who did this boat belong to?

The Witness: Van Camp.

The Court: How did you happen to be operating it?

The Witness: They chartered the boat to us.

The Court: To whom?

The Witness: To me and my father. I was acting skipper.

The Court: And what were the terms of the charter?

The Witness: We put on our own nets. You see, the boat works on a share basis.

The Court: Were you gentlemen able to agree at lunch time as to whether this former written charter was still being recognized as the agreement between the parties?

Mr. Toner: I am inclined to believe, if the court please, it was not. I have a witness here who is with

(Testimony of Anthony DiLeva—Bessemer)

the [109] Van Camp Sea Food Company. I believe that he is the best witness to explain the nature of the arrangement.

The Court: Very well, we will hear both sides. Where is your father?

The Witness: He is home. He don't feel so good.

The Court: How do you know what the terms of the agreement were?

The Witness: Because I was there.

The Court: At the time you chartered the boat?

The Witness: Yes.

The Court: Who did you make your agreement with?

The Witness: With the Van Camp Sea Food Company.

The Court: And in substance what was that agreement?

The Witness: That we run the boat and that we do all the hiring, firing, and that we bring the boat as best we can—go out fishing, bring the fish in for them and that we hire the crew and we put on our own nets and when we make count on payday they take so much and the boat takes so much of the shares.

The Court: How much does the boat take?

The Witness: It varies. It is according to the union. When you have 13 or more men you get five and three-quarters shares—that is boat and net. When you have less than 13 men on it you have five and a quarter shares, the boat and men. Well, it happened we had 14 so we would get five and three- [110] quarters. Well, the boat would get three shares and the net would get two and three-quarters. Then the Van Camp give us, allowed us, give us a half share for me and my father to split for

(Testimony of Anthony DiLeva—Bessemer)

acting, for bringing the boat, fishing, and then each man has a share of their own. That is the way they split the money. In other words, we would be getting the net and half a share for running the boat. They would give us three and a quarter shares and the boat would actually get two and a half and then each man, as many men as you have, you have one share for each person on the boat.

The Court: That is all.

Mr. Lande: That is all I have, your Honor.

The Court: That is all the questions you have?

Mr. Lande: All from this witness. You may cross-examine.

#### Cross-Examination

By Mr. Toner:

Q. How old are you, Tony? A. 25.

Q. When was this contract that you are speaking about made? A. 1941.

The Court: You have been using the boat ever since then?

The Witness: Yes; we bought it since then.

The Court: What? [111]

The Witness: We have bought the boat since then.

The Court: You have bought the boat since the collision?

The Witness: No, afterwards we bought the boat. We have been running—we ran it three years and then we bought it.

The Court: Who owns the boat now?

The Witness: We do now.

The Court: How long have you owned it?

The Witness: Oh, about a year and a half now.



(Testimony of Anthony DiLeva—Bessemer)

The Court: In other words, since the accident?

The Witness: Since the accident, yes.

Q. By Mr. Toner: There were 14 men as a full crew?      A. Yes.

Q. I notice that there are only 13 men joined as Libelants. Who did not join as a Libelant?

A. Well, at first they said I could not be a Libelant. They said that we had—that I had to sue later. That is why.

The Court: But you appear here as a Libelant.

The Witness: Yes.

Mr. Lande: I took the crew list, your Honor, and I don't think I left any out.

Q. By Mr. Toner: Was Pete Barbari a member of your crew?

A. I am pretty sure he was—no, no, he wasn't at that [112] time. Well since then, your Honor, you know they come and go. They quit and then you hire somebody else and they have a list of all the crew, but I don't know if Barbari was on or off.

Q. By Mr. Toner: He might have been a member of your crew at the time of the accident?

A. He could have been, sure.

Mr. Toner: That is all.

The Court: That is all.

Mr. Lande: I have nothing further, your Honor. The Libelant rests.

Mr. Toner: If the court please, I do not see that there is any proof of damage particularly, but I am going to put on a witness even though I may run the risk of proving the Libelants' case.

(Testimony of Anthony DiLeva—Bessemer)

The Court: I am interested in the agreement under which this boat was chartered.

Mr. Lande: I will offer it, your Honor, for whatever it is worth.

The Court: That is an agreement that has expired.

Mr. Lande: By its terms it has expired, but evidently—

The Court: But they said they have gone through under it.

Mr. Lande: And this is the one.

The Court: He made a clear statement as to the agreement. [113]

Mr. Toner: I think we should have that agreement in evidence, however.

The Court: Will the parties stipulate to its introduction in evidence?

Mr. Toner: Yes.

The Court: Is that the original?

Mr. Toner: It is a duplicate of the original.

Mr. Lande: I think that gentlemen there can identify it.

Mr. Toner: We will stipulate this agreement was made on the 11th of September and we will put the agreement in for whatever it is worth.

The Court: If it is in evidence it will be for whatever it establishes.

Mr. Toner: That is correct.

The Court: It may be received.

(The document referred to was marked as Libelants' Exhibit No. 3, and was received in evidence.)

Mr. Toner: Mr. Gerstle, will you take the stand?

FENTON K. GERSTLE,

called as a witness by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Fenton K. Gerstle. [114]

Direct Examination

By Mr. Toner:

Q. Mr. Gerstle, where do you live?

A. At 1207 Bank Boulevard, Wilmington.

Q. And what is your occupation?

A. I pay the fishermen for all fish delivered and make their disbursements.

Q. By whom are you employed.

A. Van Camp Sea Food Company.

Q. And who owns the Bessemer?

A. At the present time it belongs to the Anthony DiLevas—to Anthony DiLeva and his father, Salvatore DiLeva, but at that time, at the time of the collision, the Van Camp Sea Food Company owned the boat.

Q. And did the Van Camp Sea Food Company also own the Gloria R at that time?      A. They did.

Q. What was the nature of the agreement with the fishermen aboard the fishing boat Bessemer at the time of the collision?

A. Well, I personally was not familiar with any agreement because I had not seen it, although we do make agreements.

Mr. Lande: I object to any further statements as immaterial. [115]

The Court: The written agreement, you mean?

(Testimony of Fenton K. Gerstle)

Q. By Mr. Toner: You are speaking of the written agreement?

A. Yes; we line up boats that will fish for us during the season so that we know approximately what to expect in—how many boats will be fishing. We don't want to overload our plant, and at the same time we want to have enough boats.

The Court: As I understand your testimony you do not know under what conditions the DiLevas had possession of this boat?

The Witness: Well, I am satisfied—

The Court: It isn't a question of whether you are satisfied. I am asking you if you know.

The Witness: I know—I did not see that particular agreement.

The Court: Then you don't know of any oral agreement, do you?

The Witness: Well, I have seen others and—

The Court: It is not a question of your seeing others.

The Witness: No; I wasn't in on any negotiations, no, sir.

Q. By Mr. Toner: What is the system whereby the DiLevas were paid for the fish they caught on board while they were operating the Bessemer?

A. It is on a share basis. For instance, if there [116] are 14 men on board each take a share and the boat takes five and three-quarters shares. If there are 19, there would be 19 and  $\frac{3}{4}$  shares to be divided after the expenses are paid, consisting of dockage, fuel and oil and ice and cleaning and so on—incidental things that are in union agreement contracts or set up by the union.



(Testimony of Fenton K. Gerstle)

Q. That is the customary shares agreement?

A. Yes, sir.

Q. And that is what is referred to as the fishermen's share agreement? A. Yes, sir.

Q. And most of your boats are operated under that agreement?

A. I would say all sardine boats are run that way.

Q. And as far as you knew was the Bessemer run that way? A. Yes, sir.

Q. You paid them in accordance with the usual custom? A. I paid them that way, sir.

Q. Will you explain to the court how you arrive at the fish settlements?

A. We take the gross catch in which it comes to us in pounds or tons and figure at \$22.00 a ton. We deduct operating expenses, consisting of fuel or oil, dockage and Association dues, which is a customary charge, and deduct [117] that from the gross. The balance is divided into shares according to the number of men on the boat for the particular fish caught.

Q. For that particular—

A. Amount of fish that is caught.

Q. On that particular day?

A. Day or days, as the case might be, if it is the same crew.

The Court: In other words, as I understand it, if there were 14 men in the crew the boat and the nets would get 5 and  $\frac{3}{4}$  shares?

The Witness: Yes, sir.

The Court: And that would make a total of  $19\frac{3}{4}$  shares?

The Witness: That is right.

(Testimony of Fenton K. Gerstle)

The Court: And the net amount received from the catch after all expenses—

The Witness: Yes, sir.

The Court: —is divided?

The Witness:  $19\frac{3}{4}$  shares—that is right. Out of that the company pays back to the captain one-half share. The reason for that is that it gives the captain an operating responsibility, a part over and above an equal share that the crew gets.

Q. By Mr. Toner: Now, provisions are deducted?

A. As an individual item—not part of the operating [118] expenses as far as the boat is concerned.

Q. So the boat does not pay for the provisions?

A. It pays no groceries.

Q. The groceries are deducted from the amount the men get?

A. Yes. Now that I might add—that is not always true. It is true, I think, in all cases but I don't always do that because some boats take their money home and do their own dividing, but in cases where I do and they give me that to do, I subtract their groceries and pay their grocery bills for them.

Q. What was done on the Bessemer.

A. We paid their groceries and made checks to the individual stores for the total grocery bill.

The Court: Let me ask with reference to the Bessemer, is it only used for sardine fishing?

The Witness: Well, and tuna. It operates, you might say, the year around when there are fish available.

The Court: That is all.

Q. By Mr. Toner: You made some compilation of the earnings of the crew of the Bessemer at that time at my request?           A. I did, sir.

(Testimony of Fenton K. Gerstle)

Q. Will you explain to the court what these compilations for the month of—how these tabulations for the month [119] of October 1944 were arrived at?

A. May I read this?

Q. Yes.

Mr. Toner: I propose to offer these in evidence, if the court please.

The Court: Yes.

The Witness: For the 14th, 16th, 17th and 18th, which are four deliveries, there were 18 and  $\frac{3}{4}$  shares for that amount of gross fish of \$2,926.55. We had expenses of \$94.27; and taking out two and three-quarters shares for the boat left \$2,416.80 belonging to the crew. That was divided among 13 men.

For the next period the crew consisted of one more man. We had five deliveries and the gross was \$4,771.80. Expenses were \$69.42. The boat took two and three-quarter shares as usual, leaving \$4,047.53 to be divided among the crew of 14 men. We had a third change in the crew of two days only, the 27th and 28th. The gross was \$2,167.00; expenses were \$46.51. Taking away the boat's share of \$311.05 left \$1,809.44 for the crew; and that was back to 13 men again.

Mr. Toner: Now, I offer or I would like to have the settlement tabulation for October 1944 marked in evidence. It consists of a large yellow sheet and three supplemental sheets—fish settlement sheets.

The Witness: That is right. [120]

The Court: They will be admitted next in order.

(The document referred to was marked as Respondent's Exhibit No. B, and was received into evidence.)

(Testimony of Fenton K. Gerstle)

Mr. Toner: I would likewise offer in evidence a similar tabulation for November of 1944 as Respondent's Exhibit C, and a similar tabulation covering the period for December, 1944, marked as Respondent's Exhibit next in order.

The Court: The documents will be received.

(The documents referred to were marked as Respondent's Exhibits C and D, respectively, and were received into evidence.)

The Court: How many fishing days would there be in October? As I understand, October 4th was the first day this boat went out. Is it possible that for each of those days, the eight days that the boat was laid up, could it have actually been fishing? I want to know what the contention of the parties is.

Mr. Lande: Our contention as shown by the report of the California State Fish and Game Commission, shows that during that period, October 4th to the 13th, 89 vessels, which composes the fleet in Los Angeles harbor, brought in 66 million and some-odd pounds of fish. That is on the first paragraph of the Fish and Game letter. That shows 66 million, 389 thousand, 68 pounds of sardines were delivered in the Los Angeles Harbor between October 4th to 13th, 1944, both dates inclusive. [121]

The Court: But what I am interested in is if this boat could have brought in fish each of those eight days. For instance, the report on the first tabulation for October shows there were deliveries on the 14th, 16th, 17th and 18th and then it shows deliveries on the 19th, 21st, 23rd, 24th and 25th, and the 27th and 28th. There are



(Testimony of Fenton K. Gerstle)

11 deliveries of fish from the 13th of October to the 30th, a period of 17 days. I am not certain that you understand what is in my mind. While you have stipulated there were 8 fishing days would each one of those days be a producing day?

Mr. Lande: It will be our contention, from what the captain tells me—I would like to ask to re-open the case to put on his testimony as to whether at the beginning of the season the fish were running heavy and whether he could have fished every day during that period of time.

The Court: I am going to let you argue that later. I am trying to get the facts and trying to get the picture in my mind.

Mr. Toner: Mr. Gerstle, you are familiar with the fishing operations. As a matter of fact, you are very familiar with them.

The Court: That is your business.

The Witness: Yes, sir; but I am not a fisherman. I do not go out to sea.

Q. By Mr. Toner: Will you explain to the court what [122] the fishermen mean when they call it "dark"?

A. Well, it is between the period, during the calendar month after the full of the moon is past two days until two days before the full of the moon.

Q. In other words, they cannot fish during the full of the moon?

A. No. It is not a State law, but it is an agreement between fishermen. They take five days in there during the full of the moon. They do not fish.

Q. Do they fish for sardines at night?

A. Yes, sir.

(Testimony of Fenton K. Gerstle)

Q. Is it the reason they fish sardines at night because they locate the schools of fish by the fire?

A. Phosphorescence in the water.

Q. And that phosphorescence cannot be seen during the full of the moon?

A. No, sir; it is not so good they claim. They claim the fish are probably not so good either. I am not so sure of that.

Q. In October 1944 when did the dark start?

A. Well, the season opened the 1st and it was either three or four days—I just don't have anything to refer to, but around the 4th or 5th of October.

Q. Now, the fishermen do not fish on Saturday night, is that right? [123]

A. No, sir; they do not go out Saturday night. We take no fish on Sundays.

Q. Because you take no fish on Sunday?

A. That is right. They do not go Saturday night.

Q. So one day of a week is out?

A. That is right.

Q. All other days during the month, with the exception of Sundays, are fishing days?

A. Except for the five days during the full of the moon.

Mr. Lande: If the court please, in this tabulation that counsel has submitted, there are two fishing days that are not listed, and I would like to ask this witness the question as to whether or not any fish were brought in at that time. I am speaking with reference to the 19th and 26th. Do your records indicate that the Bessemer brought any fish in on October 19th, rather than on October 20th and on October 26th?

(Testimony of Fenton K. Gerstle)

The Witness: We paid for no fish—for no deliveries on those dates. We did not pay for any fish delivered on that day because we did not receive any.

Cross-Examination

By Mr. Lande:

Q. On the other days that you have skipped, they are apparently Sundays, is that right?

A. Well, I believe there would be some dates in there. [124] I would say they were—what we call “missed that night.”

Q. What do you mean by that?

A. Did not catch any fish.

The Court: “Lost Weekend,” as I understand it.

The Witness: Went out and didn’t find any fish or didn’t go out. I can’t answer for them. I wasn’t along.

Mr. Toner: In any event, they did not deliver any fish?

The Witness: They did not deliver any fish, no.

Mr. Toner: That is all.

Q. By Mr. Lande: Mr. Gerstle, what did you say about \$100.00 would be the ordinary expense the boat would run into as far as the boat’s share was concerned for the eight days?

The Court: For each day.

Mr. Lande: Eight days—eight days figuring around—

A. Well, I will tell you—it largely depends if they go out consistently every night, which is possible, it would be that much, but if they go out and miss and they lay in shelter of the Island for protection it probably would not run that much.

Q. \$100.00 would be a liberal allowance?

A. I think it is too much.

(Testimony of Fenton K. Gerstle)

Q. Let me show you Libelants' Exhibit 1. I want you to look at the second page of this attachment, Mr. Gerstle; and it has been stipulated that the record of the Fish and [125] Game Commission would disclose this to be the deliveries in pounds of sardines during October, November and December? A. Yes.

Q. I want you to look that over, the dates and the pounds delivered and the totals and— A. Yes.

Q. Now, Mr. Gerstle, wouldn't you say that vessel and the crew were hitting the fish pretty well and getting good catches during that time?

A. Well, I said if they worked consistently, yes.

Q. You say they did? A. I think they did.

Q. They were lucky or skillful enough to get good results? A. Yes.

Q. Is that correct?

A. Have you compared it with some other boat that could do better?

Q. I am talking about the average of your fleet down there. You have got quite a few boats in the Van Camp fleet, haven't you? A. We do, yes, but I would—

Q. We just want you to help us—to give us an idea—

The Court: What difference does it make whether they were doing well or poor? Isn't the court going to have to [126] reach a determination upon the average return of this boat for the balance of the season or even that month?

Mr. Lande: Yes, that was the method I had in mind.

The Court: I don't know whether this boat was doing well or poorly. We haven't the figures here.

Mr. Lande: That is just what I asked this witness.



(Testimony of Fenton K. Gerstle)

The Court: He would not know either; it would be just his opinion.

Mr. Lande: I have no further questions.

Mr. Toner: I have one more question.

### Redirect Examination

By Mr. Toner:

Q. Mr. Gerstle, when fishermen operate on a shares basis can they quit at any time they want?

A. Well, I believe they do.

Mr. Lande: There is no dispute about that. My witness testified to that.

The Witness: They do quit. I believe they are not allowed to be discharged but they can quit.

Q. By Mr. Toner: That is a union rule?

A. Yes, sir.

Mr. Toner: That is all.

### Recross-Examination

By Mr. Lande:

Q. It is part of your union contract—it is a [127] matter of contract?

A. Yes, but not—of course the company might agree to that, but we don't. The union agreements are between the fishermen and the master of the boat and not with the company. The company has nothing to say about that at all.

Q. But the master is bound by it? A. Yes.

The Court: Let me ask you in this particular situation, with reference to the Bessemer, did the DiLevas have custody and possession of the boat?

The Witness: Well, you mean as far as the managing of the boat was concerned?

(Testimony of Fenton K. Gerstle)

The Court: Yes.

The Witness: Yes, we turned it over to them. Whether there was an agreement I don't know.

The Court: You turned it over to them?

The Witness: Yes; they operated it and delivered the fish to us.

The Court: And they dock the boat where they wanted to?

The Witness: Yes.

The Court: When it was not in use?

The Witness: They were supposed to keep the boat up.

The Court: Keep the boat up?

The Witness: That is right.

The Court: So that the only thing that concerned you [128] was the ownership of the boat, but the possession and operation of it had been turned over to them?

The Witness: Well, just the possession from the fact they were managing it but we didn't relinquish our ownership to them.

The Court: I am not trying to get you to say that you did not own the boat, but I am trying to ascertain the relationship.

The Witness: It is a working agreement, that is all it is.

The Court: When you charter a boat that is a working agreement, isn't it, whereby you are operating another man's vessel?

The Witness: That is right.

The Court: And that is what they were doing?

The Witness: That is what they were doing, yes.

The Court: That is all.

(Testimony of Fenton K. Gerstle)

Redirect Examination

By Mr. Toner :

Q. Mr. Gerstle, do you regard them as your employees?

Mr. Lande: I object to that as incompetent, irrelevant and immaterial, and calling for an opinion of the witness and a conclusion and not as a matter of fact.

The Court: If he knows.

Mr. Lande: How he regards them? [129]

The Court: How he regards them?

Mr. Lande: Yes.

The Court: That would not be admissible.

Q. By Mr. Toner: Mr. Gerstle, do you pay Social Security taxes on the employees of the fish boats?

A. When that boat was owned by us we did.

The Court: Did you deduct it?

The Witness: I took it from the crew and remitted it to the proper department.

Q. By Mr. Toner: Did you pay State unemployment relief taxes?

A. May I ask do you mean the 2.7?

Q. Yes.            A. Yes, the company pays that.

Q. And you paid the Federal Social Security?

A. Yes, sir.

Q. Do you carry any Workmen's Compensation Insurance on these men?

A. I believe not. They are not covered—if I am not mistaken they are not covered.

Q. Is there any other tax or report that you have to make on these fishermen similar to reports you make for your other employees?

A. I don't understand your question.

(Testimony of Fenton K. Gerstle)

Q. As to any other— [130]

A. The only reports we make is for the Social Security, unemployment and old age and the withholding taxes. That is the only report we turn in for these fishermen.

Mr. Toner: That is all.

Mr. Lande: No questions.

Mr. Toner: The Respondent rests.

Mr. Lande: Mr. DiLeva.

ANTHONY DiLEVA (Bessemer),

called as a witness by and on behalf of the Libelants, having been previously duly sworn, resumed the stand and testified in rebuttal as follows:

Direct Examination

By Mr. Lande:

Q. Mr. DiLeva, as captain of the boat, can you tell us whether or not your vessel would have fished from the period October 4th to 13th, 1944, but for this accident?

A. There was no reason why it shouldn't. We had the crew.

Q. Your answer is you would have fished?

A. Yes, we would.

The Court: How about Saturday?

The Witness: Saturday, no. That is a union law.

The Court: There was one day in there you would not have worked?

The Witness: One day a week you wouldn't work, yes, sir. [131]



(Testimony of Anthony DiLeva—Bessemer)

The Court: As a matter of fact, there were seven fishing days that you lost?

Q. By Mr. Lande: Did you hear how the fish were running during this period of the 4th to the 13th?

A. Running heavy.

Q. Tell the court what you heard as to the—

The Court: I don't care what he heard.

The Witness: Not what I heard; I seen them coming in.

Q. By Mr. Lande: Tell the court what you saw?

A. We saw them all come in loaded.

Q. Loaded with what? A. Sardines.

Q. During that period of time? A. Yes, sir.

Mr. Lande: That is all.

### Cross-Examination

By Mr. Toner:

Q. Mr. DiLeva, even on days when other boats catch full loads you sometimes miss, don't you?

A. Oh, often, yes.

The Court: You never know?

The Witness: Never know exactly.

The Court: What you are going to get?

The Witness: No; that is something you don't know until you go out. [132]

Mr. Toner: That is all, if the court please.

Mr. Lande: The Libelants rest, your Honor.

Mr. Toner: The Respondent rests, your Honor.

The Court: Gentlemen, I think the only thing to do with this case is submit it on briefs.

Mr. Toner: That is entirely satisfactory to us if the court believes so. It is rather complicated.

The Court: You are going to have a transcript of this testimony?

Mr. Toner: I rather believe that would be necessary.

The Court: But it seems to me, as I stated before, that your initial premise upon which you preliminarily attacked this proceeding is considerably weakened by the admission of this agreement. Apparently from the testimony it was a working agreement that had many of the earmarks of a charter. Of course Van Camps recognized that they were primarily interested in securing fish and all they wanted was to maintain a string of boats so they would have a steady supply of fish for their cannery.

Mr. Toner: The argument was based on the allegation in the libel that this was a shares agreement. Frankly I think the parties were operating on a true shares agreement. That is very customary in the fishing industry.

The Court: I understand that, but a shares agreement, in a sense, may take on the nature of a charter. [133]

I am going to give you gentlemen an opportunity to brief the case and I will listen to argument on the question of liability, but the burden is going to be on the Respondent in this case, because I am rather inclined to believe that the Gloria R was responsible for this accident. That is my present state of mind.

It may be that in pointing out the evidence I might change my views in that respect. I feel that this is more of a question which will resolve itself down to whether these fishermen have to take this loss by reason of their negligence in the operation of another boat, because both boats are owned by the same person or same company.

How long do you want to brief it?

Mr. Toner: I would like to have ten days after I get the transcript.

The Court: How long do you want to reply?

Mr. Lande: Ten days or five days.

The Court: I will give you 20 and 15. I am going to be away the latter part of next month so I will not be able to work on it.

Mr. Toner: 20 days from today.

The Court: You said you could have it in ten days, so I am giving you plenty of time—20 and 15, and then if I want any additional briefs I will call for them.

Mr. Toner: If the court please, on the question of the [134] photographs, I called the insurance company and they don't seem to have any photographs in their file. I was almost sure that they didn't have.

The Court: I think how this accident occurred is quite clear—that is, as to how the boats came together. I thought there might be a dispute when I was asking about it, but they are pretty well in accord.

Mr. Toner: The bow of the Bessemer and the amidships of the Gloria R came in contact with each other.

The Court: It will be considered submitted.

(Whereupon, at 3:00 o'clock p. m., the above entitled matter was concluded.)

[Endorsed]: Filed Jun. 20, 1946. Edmund L. Smith, Clerk.

Case No. 4630-PH. DiLeva vs. Van Camp. Lib. Exhibit No. 4. Date Oct. 30, 1947. No. 4 Identification. Date Oct. 30, 1947. No. 4 in Evidence. Clerk, U. S. District Court, Sou. Dist of Calif. J. M. Horn, Deputy Clerk. [135]

[Title of District Court and Cause]

\* \* \* \* \*

Los Angeles, California, Monday, April 7, 1947

10:00 A. M.

The Court: Call the calendar, Mr. Clerk.

The Clerk: Salvatore DiLeva and others versus Van Camp Sea Food Company, Incorporated.

Mr. Lande: Ready for the libelants.

Mr. Toner: Ready for the respondent.

The Court: I think I have heard all the argument on this case I care to hear. I am going to overrule the objections and direct that process issue for this new party so he will be brought into the suit.

Mr. Toner: If the court please, are we leaving the Van Camp Sea Food Company in the case?

The Court: Yes. I feel that part of the trouble in this case has been the court's own fault. What I should have done in the first place, after the hearing, I should have directed this other DiLeva be brought into the case and process issue.

As I understand the law DiLeva is a second party. If he is brought into the case and there is no cause of action against him he has his right of recovery.

Mr. Toner: We have been discussing this case prior to the hearing this morning and we practically came to the conclusion that under this Lowe vs. Goldstein case these men were all employees of the boat owner. The only point [3] that I make is that we are perfectly willing to stipulate that the employees, fishermen on the Gloria R were in the same status as the fishermen on the other vessel.



The Court: That is the reason I re-opened the case. There was intimation to that effect and as a matter of fairness and in order to avoid what I thought might be an injustice, I have worked and fussed and counsel have worked and fussed over this two-bit case for two years. I am going to clean it up and let you gentlemen take it to the Circuit Court and let them fuss around with it for a while. If you want to make a lawsuit over something I am going to give you plenty of opportunity to do so but I am going to direct process to be issued for this other DiLeva so he will have an opportunity to appear.

Mr. Lande: May I make a suggestion in the matter? It seems to me that if counsel is willing to stipulate—

The Court: How can he stipulate away the other man's rights? He is only appearing for Van Camp. If their status is the same then a judgment would be against DiLeva and he isn't appearing for DiLeva. He can't appear for both of them because their interests are antagonistic.

Mr. Toner: I don't think there is any technical adverse interest here, if the court please. It is either one or the other.

The Court: But as soon as you try to shift it from [4] Van Camp you are shifting it to DiLeva.

Now, if you can appear for both of them, all right, but DiLeva has not appeared in this case and there has been no process issued.

Mr. Toner: Currently that is right.

The Court: And I want process issued and we will dispose of it.

Mr. Lande: You see we had a trial as to liability although the DiLevas were in court.

The Court: But they were not parties to the action.

Mr. Lande: If Mr. Toner would stipulate that Van Camp is bound by the liability and by virtue of the fact that one of their employees operated the Gloria R—

The Court: But of course the intimation to this court is that DiLeva is operating under a bare bottom charter.

Mr. Lande: Of course I think counsel and I have been both educated since we came across the Goldstein case. That case squarely holds where the cannery controls, where that boat fishes and controls who is to be the master of the vessels then the crew and the master are the employees of the cannery. Now, the court will recall in this testimony here there is no question that Van Camp insisted that those boats fish for Van Camp. There is no question but they had control over who was the master of that vessel. There is no question that all the people were carried on their rolls as [5] employees. I think we would be wasting the court's time because those are absolute facts.

The Court: I have wasted a lot of time. I have a great big file over a two-bit case.

If you gentlemen can arrange it by stipulation and submit it to me, all right. But in any event I want a transcript of the proceedings—the first proceedings.

Mr. Toner: We have a transcript of it, and will furnish the court with a copy.

The Court: I will have to refresh my memory and then decide the case either right or wrong and let you men fight it out in the Circuit Court.

I have tried my best to get you men together on this two-bit case and if you want to spend a lot of money I am going to let you spend a lot more.

Mr. Toner: If counsel for the libelant will light some place and take a position as he is taking now, that these men were employees of Van Camp, there is no necessity for the DiLevas to be in the case. If counsel will submit an amended—

The Court: I have heard the evidence, gentlemen, and I am going to decide the law. You are not going to stipulate the law for me. I have heard the facts and I will pass on the law. All I want is a stipulation of facts as far as liability is concerned and who is liable or not is the [6] responsibility of the court.

Mr. Lande: I think we should be able to get together on a stipulation.

The Court: You gentlemen haven't been able to get together on anything. All you are able to do is run back and forth and run bills up on your clients for the last year and a half.

Mr. Lande: May we have a five-day stay to see if counsel can't get together on a stipulation, and if we can't then process will be issued?

The Court: I want to say this, gentlemen. If the second DiLeva is not in it you are going to get a judgment against you because I am satisfied in my own mind that you had a bare bottom charter and that the relationship of employer and employee did not exist. I am giving you now an opportunity to get in or get out. If you want to get yourselves out, all right.

Mr. Toner: If the court please—

Mr. Lande: We will bring the DiLevas in.

Mr. Toner: With all due respect to the court—

The Court: You don't have to show any respect to the court. I don't care anything about that.

Mr. Toner: I should like to ask the court to read the comments of the Circuit Court of Appeals in the case of Lowe vs. Goldstein that counsel was talking about, in which [7] the clear holding is that these men were employees of the cannery. Some attorneys in the lower court tried to get as much error in the record as they could—

The Court: And you have done a pretty good job in this case, both of you. There isn't any judgment I can render here that will hold water. I have tried my best to get you people to sit down around a table and settle this case instead of running up big attorney bills for both sides. Neither one of you are going to get out of it the amount of time you have put in even if you get all of your recovery.

Mr. Toner: At worst that is a mutual fault.

The Court: If you gentlemen want to submit it to me on a stipulation of additional facts that will be satisfactory.

Mr. Lande: We will see if we can work it out.

The Court: I am going to give you a decision so you can go to the Circuit Court and spend more money.

(Whereupon, the above entitled matter was concluded.)

[Endorsed]: Filed Mar. 5, 1948. Edmund L. Smith, Clerk. [8]



[Title of District Court and Cause]

\*      \*      \*      \*      \*      \*      \*      \*

Los Angeles, California, Monday, June 30th, 1947

10:00 A. M.

The Court: You may proceed.

The Clerk: Anthony DiLeva and others versus Van  
Camp Sea Food Company, Inc.

Mr. Toner: The respondent is ready.

Mr. Lande: The libelant is ready.

The Court: How soon can you gentlemen finish trying  
this case?

Mr. Toner: If the court please, I should like to submit for the court's approval the question of whether or not the new party in this case can have the case tried anew without having this court being affected by the previous trial. I wonder if it wouldn't be, perhaps, advisable to have the case assigned to some other judge for trial because after all, the new party that is in this case is entitled to a complete trial on the merits and if this court feels that it might be swayed by its previous decision in this case—

The Court: Gentlemen, my position is this. If the parties do not feel they can have a fair trial before me I don't want to try the case.

Mr. Toner: I am not saying that.

The Court: If that is the state of mind of the party I don't want to try his case. I want him to feel when he gets through with this case that he has had a fair trial

and [3] if he feels that this court cannot give him a fair trial I don't want to try it.

You are representing him?

Mr. Toner: Yes.

The Court: And you are representing conflicting interests, too?

Mr. Toner: No.

The Court: You are representing conflicting interests because as attorney here before this court you are also representing the Van Camp Sea Food Company and the other party. It is a question of whether or not both are liable or either are liable and therefore there is a conflict of interest.

That party should have independent advice.

Mr. Toner: The contention of both defendants is identical in that both defendants are respondents, or the respondents contend that the fish boss was an employee of the Van Camp Sea Food Company and the contentions being identical there can be no adverse interest.

I can appreciate the court's statement if Van Camp Sea Food Company were to say, "Oh, no, you fellows are charterers," and then the fish boss would turn around and say, "We are not charterers; we are employees."

But both parties are maintaining the same identical contention on the same identical issue. [4]

The Court: I continued this matter for your benefit as the representative of the Van Camp Sea Food Company. If it is still your position that the Van Camp Sea

Food Company is liable here, if there is any liability, I can settle the case without any further trial.

Mr. Lande: I would suggest that course of action in view of counsel's statement.

Mr. Toner: Our position is that this alleged charterer which the libellant brought in at the court's suggestion, is clearly an employee under the previous holding of the Ninth Circuit in *Lowe* against Goldstein.

The Court: Well, gentlemen, I will disqualify myself in this case and direct the case be assigned to another judge and I will get rid of you people that way very quickly.

I don't like the smell of it as far as you are concerned, coming in here and representing conflicting interests. And as far as you are concerned I hope that you never come back in this court again. I guess you hope you never have to.

Mr. Toner: Well, we will be back, Judge.

The Court: Now, just a moment. I feel that your statement has been a reflection on this court. I have heard this case. I have tried to give it consideration so that you people could have your full day in court and you come in here representing what on the face of it, as far as the evidence [5] is concerned, conflicting interests and I don't want you in this court any more. I am going to disqualify myself and as far as you are concerned if you have any other cases in this court have some other member of your firm appear here.

Mr. Toner: I am very sorry, sir, that the court feels that way about it.

The Court: That is the order. It is re-assigned to some other judge and you can fight it out there and pull your hot stuff on them, but you can't pull any more of it on me.

(Whereupon, the above entitled matter was concluded.)

[Endorsed]: Filed Mar. 5, 1948. Edmund L. Smith, Clerk. [6]

[Endorsed]: No. 11877. United States Circuit Court of Appeals for the Ninth Circuit. Van Camp Sea Food Company, Inc., a corporation, Appellant, vs. Anthony DiLeva, Ivan Jurjev, Marie DiLeva, Mike DiLeva, Salvatore DiLeva, Jack Olsen, Marino Transatti, Angelo Castagnola, Chigi Romolio, Salvatore Carnavale, Matteo Vologna, Pasquale Guglielmo and Pietro Colombo, Appellees. Apostles on Appeal Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed March 8, 1948.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for  
the Ninth Circuit



14. The District Court erred in awarding damages and costs to appellee in the amounts assessed or at all.

The appellant hereby designates the following parts of the record which it thinks necessary for a consideration of the foregoing points:

\*      \*      \*      \*      \*      \*      \*      \*

Dated March 16, 1948.

McCUTCHEN, THOMAS, MATTHEW,  
GRIFFITHS & GREENE  
HAROLD A. BLACK  
GEORGE E. TONER

Proctors for Appellants

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 19, 1948. Paul P. O'Brien,  
Clerk.

No. 11877.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

VAN CAMP SEA FOOD COMPANY, INC., a corporation,  
*Appellant,*

*vs.*

ANTHONY DiLEVA, IVAN JURJEV, MARIE DiLEVA,  
MIKE DiLEVA, SALVATORE DiLEVA, JACK OLSEN,  
MARINO TRANSATTI, ANGELO CASTAGNOLA, CHIGI  
ROMOLIO, SALVATORE CARNAVALE, MATTEO BOLOGNA,  
PASQUALE GUGLIELMO and PIETRO COLOMBO,  
*Appellees.*

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OPENING BRIEF FOR APPELLANT.

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FILED

JUL - 2 1940

PAUL P. O'BRIEN,

McCUTCHEN, THOMAS, MATTHEW,  
GRIFFITHS & GREENE,

HAROLD A. BLACK,

GEORGE E. TONER,

704 Roosevelt Building, Los Angeles 14,

*Proctors for Appellant.*



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No. 11877.  
IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

VAN CAMP SEA FOOD COMPANY, INC., a corporation,  
*Appellant,*

*vs.*

ANTHONY DiLEVA, IVAN JURJEV, MARIE DiLEVA,  
MIKE DiLEVA, SALVATORE DiLEVA, JACK OLSEN,  
MARINO TRANSATTI, ANGELO CASTAGNOLA, CHIGI  
ROMOLIO, SALVATORE CARNAVALE, MATTEO BOLOGNA,  
PASQUALE GUGLIELMO and PIETRO COLOMBO,  
*Appellees.*

---

**OPENING BRIEF FOR APPELLANT.**

---

This appeal is from a final decree (entitled "Judgment") in admiralty of the District Court for the Southern District of California, Central Division, Hon. Peirson M. Hall, presiding, which adjudged appellant liable to appellee DiLeva for himself and for the other appellees in various amounts less unspecified amounts for taxes, entered December 9, 1947; the appeal is also from the order of the said District Court made and entered in the minutes of District Court on October 30, 1947, by which appellant was ordered to pay damages to appellee Salvatore DiLeva in the sum of \$4,752, less operating expenses, unemployment taxes and withholding taxes.

The case was tried twice in the District Court. The first trial was by Hon. Ben Harrison on the second



amended libel. By memorandum opinion he indicated that the action had been brought against the wrong party. Appellees were allowed to amend and join another party. Trial on the fifth amended libel was *de novo* by Judge Hall. He dismissed the action as to the new party and entered the decree against appellant from which this appeal is taken.

### Statement as to Jurisdiction.

Admitted allegations in the pleadings show that the cause set forth in the libel is for maritime collision and wages, of which the District Court had jurisdiction by virtue of the constitutional grant of admiralty jurisdiction (Art. III, Sec. 2) and Sections 24 and 256 of the Judicial Code ((28 U. S. C. A., Sec. 41(3); 371)). The jurisdiction of this Court to review the said decree rests upon Section 128 of the Judicial Code ((28 U. S. C. A., Sec. 225, assignments of error [A. 51], petition for appeal [A. 48], order allowing appeal [A. 49])), notice of appeal [A. 51], citation on appeal [A. 2] all duly served and filed within the statutory period.

### Statement of the Pleadings.

Appellant has included in the Apostles only the libels and the pleadings thereto upon which the two trials below were had. The original libel, the first, third and fourth amended libels, which appear in the clerk's transcript, are summarized below to acquaint the Court with the proceedings.

The original action was by appellees Anthony DiLeva, Ivan Jurjev, Marie DiLeva, Mike DiLeva, Salvatore DiLeva, Jack Olsen, Marino Transatti, Angelo Castagnola, Chigi Romolio, Salvatore Carnevale, Matteo Bologna,

Pasquale Guglielmo and Pietro Colombo against appellant. They alleged that they were the crew of the BESSEMER on a share agreement, that appellant owned the GLORIA R, that due to negligence of appellant's employees the GLORIA R collided with the BESSEMER and that they thereby lost eight fishing days for which they sought recovery. Appellant's exceptions were sustained, with leave to amend.

The first amended libel, by the same libelants against the same respondents, was substantially the same, to which was added the allegation that appellant was also the owner of the BESSEMER, and that Anthony DiLeva was operating the vessel as master by authority of appellant. Appellant's exceptions to the first amended libel were overruled with leave to answer.

Before appellant answered, however, appellees served and filed the second amended libel [A. 3] in which the same parties appeared. The only change was a substantial alteration of the description of the maneuvering of the BESSEMER at and previous to the time of collision. Appellant excepted to the libel [A. 8], and answered [A. 9], admitting ownership of the BESSEMER and the GLORIA R and that the fishermen of both boats were its employees; appellant alleged that appellees were operating under a fishermen's shares agreement by virtue of which appellees' wages were contingent upon profits being earned from operation of the BESSEMER to which appellant was entitled, but which if earned it was obligated to share with appellees. Appellant denied negligence of the GLORIA R and alleged that the collision was due to sole fault of the BESSEMER; admitted that the vessel was laid up eight fishing days and alleged that no profits were

made during that period and that appellant had no obligation to appellees therefor.

Appellee's exceptions were overruled and the case proceeded to trial before Judge Harrison. The District Judge upon submission of the case rendered a Memorandum Opinion [A. 14] in which he found the GLORIA R in sole fault; that a "charter party agreement" [A. 90] (which had been offered by appellees as the agreement under which they had been operating) showed that the fishermen were not employees of appellant; that the appellees could not recover under the existing status of the case but probably could effect a recovery by amending their libel and joining a new party, the so-called "charterer" of the GLORIA R. Appellees were given the opportunity to amend.

In the Third Amended Libel, appellee Salvatore DiLeva alone appeared as libelant with appellant, and Gennaro DiLeva and Anthony DiLeva as respondents. No order allowing such change of parties was obtained. It alleged that appellee Salvatore DiLeva was the charterer of the BESSEMER and the other appellees were crew members, for whom Salvatore DiLeva was suing; that appellant owned the GLORIA R, with Gennaro DiLeva as charterer and Anthony DiLeva as master, but that libelant was uncertain as to whether the appellant or Gennaro DiLeva was in fact the employer of the master and crew of the GLORIA R.

Appellant's exceptions to this libel were sustained. The action was dismissed as to Gennaro DiLeva and Anthony DiLeva by stipulation.

In the Fourth Amended Libel, appellee Salvatore DiLeva was libelant and appellant respondent. It alleged



that Salvatore DiLeva was charterer of the BESSEMER who employed and was suing on behalf of the other appellees as crew members of the BESSEMER; that they were operating under a "share agreement"; that appellant was the owner of the GLORIA R and employer of her master and crew. Appellant's exceptions to the Fourth Amended Libel were sustained.

In the Fifth Amended Libel [A. 16] appellee Salvatore DiLeva is libellant, suing on behalf of the balance of appellees. Appellant and Gennaro DiLeva are named as respondents but initially service was made only upon appellant. Appellant is described as the owner of both fish-boats. Salvatore DiLeva was alleged to be in possession of the BESSEMER under an oral agreement for possession during the current sardine season; he placed his net aboard, he engaged a crew, nominated a master who was appointed by appellant, had control of the activities and conduct of the crew (the other appellees). The compensation of appellees was a share of the fish caught by the BESSEMER, all of which was required to be delivered to appellant. Appellees were carried on appellant's books as employees and proper tax deduction made by appellant. Appellant was alleged to have either employed Gennaro DiLeva to operate the vessel or to have given him a demise or a bareboat charter; it was further alleged that either appellant or Gennaro DiLeva employed a master and crew for the GLORIA R. Appellant excepted.

In the colloquy between counsel and the Court at the hearing of the exceptions on April 7, 1947 [A. 313-317], the Court indicated that the exceptions were overruled, that the Court was of the opinion that appellees were not employees of appellant. Counsel for appellees took



the position that these men were employees [A. 315]. When the Court told appellee's counsel that he would receive an adverse judgment if the "second DiLeva" were not brought in, counsel readily acquiesced. Process was issued against Gennaro DiLeva on April 9, 1947, and served. Appellant and Gennaro DiLeva excepted and answered. The answer [A. 28] alleged that appellee Salvatore DiLeva was a "fishboss," an employee of appellant, that the other appellees were also employees of appellant, working on a share agreement; that the master and crew of the GLORIA R were working under a similar share agreement identical to that in effect for the BESSEMER.

No ruling was made by the Court upon the exceptions of Gennaro DiLeva. At the hearing for setting for trial [A. 318] Judge Harrison disqualified himself and the case was transferred to Judge Hall for further proceedings.

Appellant moved for dismissal of this action [A. 37]. The motion was denied, the exceptions overruled, Judge Harrison's Memorandum Opinion was interpreted to be a vacation [A. 67] of the former trial and the case proceeded to trial. No evidence having been offered as to Gennaro DiLeva, his motion for dismissal at the close of appellee's case was granted. Judge Hall found that the collision between the fishboats was due to sole fault of the GLORIA R, and that appellees were entitled to recover damages from appellant in the sum of \$4,752 based on loss of 10 fishing days less operating expenses, unemployment taxes and withholding taxes [A. 41].

The Formal Findings of Fact [A. 42], Conclusions of Law [A. 44], and Final Decree (labeled "Judgment")

[A. 46] awarded \$239.22 to twelve appellees; \$363.53 to appellee Anthony DiLeva and an additional \$621.65 to Appellee Salvatore DiLeva for loss of use of his net, a total of \$3,855.82. This decree, appellant believes to be erroneous, and has accordingly appealed.

### Statement of Facts.

At the times material to this case, appellant owned two fishboats, the BESSEMER and the GLORIA R [A. 177]. These vessels collided on October 4, 1944 while they were fishing, in the Catalina channel. The BESSEMER sustained damage which resulted in the loss of eight fishing days while repairs were effected. This action is for damages by the crew of the BESSEMER for loss of earnings during the time the vessel was unable to fish.

Appellee Salvatore DiLeva, was the owner of the net used aboard the BESSEMER and generally in charge of the operation of the vessel. His son, appellee Anthony DiLeva, was master and the balance of the named appellees were the crew. The relationship among the crew, master, "fishboss," vessel and appellant was in accordance with the San Pedro custom for vessels in the sardine fisheries [A. 178, 298].

The GLORIA R was operated under the same arrangement by Gennaro DiLeva as "fishboss," with his son Anthony DiLeva as master. The two Anthonys are cousins. The pleadings have been amended to conform to the identical spelling of the surname [A. 72].

There is much uncertainty as to the precise status claimed for appellees. Throughout the many amended libels they changed their position with surprising facility, sometimes being designated as employees of appellant and as often, described as employees of a bareboat charterer.

Whatever status the Court found necessary for a recovery at any given time, they claimed. The fact is that on September 11, 1944, appellant and appellee Salvatore DiLeva, executed a written document designated as a "charter party" [Libelant's Exhibit 1 for identification; Libelant's Exhibit 3 in the first trial; A. 90-94]. By the agreement appellant agreed to let and charterer to hire the vessel BESSEMER for a period until October 1, 1942. Charterer agreed to deliver and sell all fish caught by said vessel to appellant and appellant agreed to pay the market price for any fish accepted. Charterer agreed to furnish and maintain a net and pay certain operating expenses. Appellant agreed to provide insurance. The net proceeds computed according to San Pedro custom were to be divided into  $18\frac{3}{4}$  shares. Originally appellant was to receive three shares for charter hire of the boat, but later this was reduced to two and three-fourths shares by oral amendment [A. 106, 112]. At the time of the collision the share arrangement was as follows: Salvatore DiLeva,  $3\frac{1}{2}$  shares (one fisherman's share and the net's  $2\frac{1}{2}$  shares), appellant,  $2\frac{3}{4}$  shares (for the boat); Anthony DiLeva,  $1\frac{1}{2}$  shares (as master); and each of the eleven remaining crew members, one fisherman's share.

Shortly after moonrise or at about 9:00 p.m. on the date of the collision, the vessels were searching for fish in the Catalina channel several miles off the east end of Catalina Island. In the crow's nest of the BESSEMER, appellee Anthony DiLeva, directed operations as "mast-man." These vessels have dual controls, one set inside the pilot house and the other set on the topside or roof of the pilot house. The topside controls were being used. Appellee Salvatore DiLeva was at the wheel; appellee Mike DiLeva, the master's brother, was at the engine



controls and appellee Salvatore Carnevale was also in the pilot house, and Chigi Romolio was bow lookout. Two crew members were in the skiff with one end of the net [A. 213] ready to lower the net upon signal. The other end of the net was on the stern of the boat.

On the GLORIA R, Anthony DiLeva was in the crow's nest, Biago Cuomo was wheelman, Nicola Curci was on the pilot house, Jacob Pugliesi was bow lookout.

There is conflict between the witnesses as to the ensuing events, prior to the collision between the bow of the BESSEMER and the starboard side of the GLORIA R amidships [A. 141].

### **The Bessemer's Version.**

The BESSEMER witnesses state that they had located a school of fish but were not sure of its exact location because the moon prevented them from seeing the usual phosphorescence [A. 79, 230]. They made two counter clockwise circles around the school. The reason for the preliminary circling of the school is to concentrate the fish [A. 144, 246]. The circle is usually made counter clockwise [A. 233], because the gear is on the left side of the boat [A. 143]. After the two counter clockwise circles, the BESSEMER started a clockwise circle, which is admittedly a "little irregular" [A. 233]. Meanwhile the GLORIA R made a large counter clockwise circle around the BESSEMER at a distance of about a mile and a half [A. 233] or two or three miles to the north [A. 81], and proceeded toward the island and south of the BESSEMER searching for fish. Not finding any, the GLORIA R headed for San Pedro. As the GLORIA R circled, her red light was visible to the BESSEMER. As the BESSEMER was completing its second counter clockwise



circle, the master of the BESSEMER states that the vessels were "red to red" [A. 82], that the BESSEMER's port light was showing to the GLORIA R and that he saw the GLORIA R's red light only. He then states [A. 83] that he saw the GLORIA R's red and green lights and thereafter the green light only which indicated a turn to port across the BESSEMER's bow. The BESSEMER had been going at one or one and a half knots during the circling [A. 80]. The master ordered full astern, when the GLORIA R was 40 to 50 feet off [A. 99], but the vessel continued forward at one-fourth or one-half mile per hour [A. 103] until the bow of the BESSEMER collided with the starboard side of the GLORIA R. It takes a half minute [A. 126] or a minute or two [A. 101] to release the clutch of the BESSEMER and put the engine full astern, and two or three minutes to come to a full stop [A. 125].

### The Gloria R's Version.

The GLORIA R, searching for fish in the vicinity of Catalina Island passed to the north of the BESSEMER, headed toward the east end of the island, found no fish and headed toward San Pedro. The green light of the BESSEMER was visible about a mile ahead [A. 137]. The GLORIA R was navigated to pass under the stern of the BESSEMER [A. 142] and would have cleared it by about 50 feet [A. 143] or 100 feet [A. 247] but for an unexpected turn to starboard which the BESSEMER made after crossing the GLORIA R's course. The BESSEMER continued the starboard turn, doubling back on her course, until her bow collided with the starboard side of the GLORIA R, which at the time was making an *in extremis* turn to port. The BESSEMER seemed, at a distance, to be stationary or nearly so [A. 155].

There is a flat conflict as to whether according to "San Pedro custom" the red masthead light indicates that the fishboat is "on fish" or whether it shows that the net is actually in the water. The GLORIA R witnesses say that it is lighted when the school is being circled [A. 142, 154, 163, 165, 171]. The BESSEMER witnesses state that the custom is to put on the red light when the net is being lowered [A. 96, 117].

The BESSEMER's white masthead light was not lighted because it interfered with seeing the fish [A. 118]. The GLORIA R was likewise operating without a white masthead light.

The GLORIA R was operating at a speed of seven or eight miles per hour and the BESSEMER at about one and one-half or two miles per hour.

As a result of the collision the BESSEMER sustained damage to her bow. She was unable to fish until October 13th and lost eight fishing days, October 4, 5, 6, 8, 9, 10, 11 and 12.

### Questions Involved.

Appellant believes these questions to be presented to this Court:

1. Do crew members on a fishboat working on a "shares" agreement have a cause of action for detention damage when two commonly owned fishboats collide?
2. What is the legal effect of a certain "charter party" provision eliminating claims for "loss of use"?
3. Was the GLORIA R in sole fault for the collision?
4. Were damages correctly awarded?

### Summary of Argument.

There is normally on appeal in admiralty a presumption of the correctness of the District Court's decree. In this case, Judge Harrison decided that appellees had no cause of action against appellant when the first trial was completed. The opposite result, reached by Judge Hall in the second trial, cannot be favored over Judge Harrison's conclusion.

Appellees were operating on a "shares agreement" in effect on all fishing boats in the sardine fisheries. There may be some doubt as to the exact legal relationship arising under a certain "charter party" agreement but appellant regards the fisherman as its employees rather than employees of an independent contractor. They are entitled to sue the shipowner as employees in the event of personal injury, the owner of the boat is obligated to pay employer's taxes and many of the *indicia* of employment are present.

The owner of the vessel is the sole owner of the right to sue for the proceeds of a fishing voyage on shares. The master and crew do not have any right to sue or title to the proceeds, but have only a right to share in the proceeds if, as and when they are realized by the owner. If there are no proceeds, either as the money equivalent of the catch, or in the form of a cause of action against a wrongdoer, there is nothing upon which the profit sharing agreement can operate. One nineteenth of nothing is nothing. The crew's rights, in the event of loss of use, are no better than the owner's rights, because the crew claims only through the owner. If the owner has no cause of action, because he cannot sue himself, the crew can stand in no better position.

An entirely new field of employer's liability is opened by the District Court's decree. That employees in one department on wages, either fixed or contingent, should be able to sue for lost wages due to casualty in another department would be a novel, and unwarranted extension of employer's liability law. The District Court's decree carried to its logical conclusion would allow such recovery.

The very informal nature of the "shares agreement," in which the employees can fish or not as they choose, and presumably can be discharged if the employer cares to expose itself to economic pressure from the union, indicates the contingent nature of the relationship. Similarly the fishermen are entitled to use the boat only when it is available. The fishermen share in the proceeds if there are proceeds. If there is no cause of action because appellant cannot sue himself, appellees have no right to sue.

If appellees by virtue of the "charter party" are employees of an independent contractor or "charterer," appellant is not liable to them because the crew members of the GLORIA R would be likewise not appellant's employees but the employees of a similar independent contractor. Both boats were operated on the same plan.

The specific provisions of the "charter party" preclude appellee Salvatore DiLeva and appellees from recovering from appellant. It defines the contractual relationship, whether it be a contract of employment or a bareboat charter, and provides that appellant shall not be liable "for loss of time or other damage . . . caused by the loss of use of the vessel by any reason whatsoever . . ." Appellees, to recover, must destroy this



specific provision, which is part of the consideration of the contract upon which they rely.

The District Judges, in both of the trials below, erred in disregarding statutory violations of the BESSEMER, when they found the GLORIA R in sole fault. These violations of the International Rules of the Road for the Prevention of Collisions at Sea are (A) failure to have a lookout with the sole duty of a lookout; (B) negligence in a special circumstances situation by failing to respect fishermen's custom as to a red masthead light, and (C) failure to exhibit the prescribed white masthead light.

Appellees must prove not only (1) that these violations did not contribute to the accident, but (2) under the *Pennsylvania* rule, that they *could not have been contributing causes*.

No issue has been raised by appellees as to the white light of the GLORIA R. The implication is that the GLORIA R was also without a white masthead light. In this event a mutual fault finding would be indicated.

If this is a mutual fault case, half damages would be all that could be allowed, provided the crew have the right to sue at all. In cases in which they have such a right, such as the lost personal effects cases, half damages have been awarded when the crew's vessel is in mutual fault with the vessel from which recovery is sought.

The District Court awarded damages to appellees for loss of ten days' time. This is a windfall of twenty percent because loss of only eight fishing days was demanded in the libel and proved. Damages for loss of fishing time should be proved with certainty because appellees were engaged in the "highly speculative pursuit of sardine fishing." Proof was not made with any degree of certainty, and any award of damages can be based only upon mere guess, speculation and surmise.

## ARGUMENT.

### I.

#### There Is Slight if Any Presumption of Correctness of the District Court's Decree.

Appellant recognizes the usual rule that on appeal the District Court's decree will be presumed correct in the absence of a showing of clear error. This case, however, does not follow the usual pattern because there were two complete trials below, before two District Judges, each of whom reached a different result. The transcript of the testimony in the first trial, before Judge Harrison, appears in the record at pages 206 to 312; the transcript of the evidence in the second trial is printed at pages 60 to 205. The first trial culminated in Judge Harrison's Memorandum Opinion [A. 14], which states in effect that appellees' action was commenced against the wrong party. The Judge amplified his opinion in the colloquy between Court and counsel [A. 316] in which he stated definitely that if appellant remained in the case as sole respondent, the Court's decree would be for appellant.

At the second trial no proof was offered against Genaro DiLeva, who was added as respondent at the Court's suggestion. The evidence duplicated the matters and issues previously covered and the opposite result was reached, so far as appellant's liability is concerned.

In this situation, appellant submits that there can be no presumption that Judge Hall's views should prevail in preference to those of Judge Harrison.

II.

**The District Court Erred in Finding That Appellees  
Had a Cause of Action Against Appellant.**

Assignments of Error applicable:

IX. The Court erred in not finding that the libelant's fifth amended libel did not state a cause of action against respondent Van Camp Sea Food Company, Inc.

X. The Court erred in not dismissing this action as to respondent Van Camp Sea Food Company, Inc., at the termination of first trial of this cause.

XI. The Court erred in permitting a second trial of the same matter as to respondent Van Camp Sea Food Company, Inc., after a complete prior trial upon the same issues.

XII. The Court erred in proceeding to a second trial upon the identical issues before the Court in the prior trial to allow libelants to join an additional party not before the Court at the time of the first trial.

XIII. The Court erred in allowing the second trial to proceed without proper order allowing addition of a new party.

XIV. The Court erred in regarding the memorandum opinion of the District Judge who presided at the first trial, as an order vacating the prior proceedings, when such memorandum opinion purported merely to allow additional proceedings as to the legal effect of an alleged charter party, and a determination of the status of the fishermen aboard both fishing vessels.

XV. The Court erred in overruling respondent's exceptions to libelant's Fifth Amended Libel.

XVI. The Court erred in its conclusion of law that respondent Van Camp Sea Food Company, Inc. is liable

for negligence of the master and crew of the GLORIA R and that the collision between said vessel and the BESSEMER was directly and proximately caused by negligence of the master and crew of the GLORIA R.

XVII. The Court erred in its conclusion of law that libelant is entitled to recover from respondent Van Camp Sea Food Company, Inc. the following sums on behalf of himself and the following crew members as damages and loss of earnings:

Ivan Jurjev	\$239.22
Mario DiLeva	239.22
Mike DiLeva	239.22
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Angelo Castagnola	239.22
Chigi Romolio	239.22
Salvatore Carnevale	239.22
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Pasquale Guglielmo	239.22
Pietro Colombo	239.22
Salvatore DiLeva	239.22
Anthony DiLeva (master)	363.53
Salvatore DiLeva (net shares)	621.65

#### A. APPELLEES WERE EMPLOYEES OF APPELLANT.

This position has been consistently maintained by appellant. Witness Gerstle, paymaster for appellant, described the relationship between appellees and appellant [A. 178, 298], under a "share basis" or fisherman's lay. The total catch of fish was reduced to dollars at the then market price of \$22.00 per ton. Operating expenses, fuel, oil, dockage, various dues were paid by the owner and charged to the gross catch. The balance was divided by the total number of "shares", in the case of the BESSEMER,



18¾ shares. The boat took 2¾ shares and the net 2½ shares. Groceries were then apportioned among the remaining 13½ master's and crew's shares, social security and withholding taxes were deducted, appellant paid the employer's social security tax and the balance was paid to the master and the crew. The Master of the BESSEMER testified [A. 89-96] that originally his father Salvatore DiLeva took the boat under a charter party agreement [A. 90-94] and that after its expiration, operation of the boat continued "all the way through" on the same terms up to the date of the accident. The agreement provided for delivery of all fish caught by the vessel to appellant. It provides further that the "Charterer," appellee Salvatore DiLeva, shall employ all of the crew of the vessel. There is nowhere any reference to control of details of the fishing and operation of the vessel but the clear implication is that the vessel's activity was controlled by the "Charterer" limited only by the provision that it was to engage in the "fishing trade in waters immediately adjacent to San Pedro in waters usually fished by vessels fishing therefrom" and that it was not to engage in illegal operations or in waters prohibited to vessels of its type, and that all of its catch be delivered to appellant.

The cases of

*Cromwell v. Slaney* (C. C. A. 1st 1933), 65 F. (2d) 940, 1933 A. M. C. 1514,

and

*Loe v. Goldstein* (C. C. A. 9th 1939), 101 F. (2d) 967, 1939 A. M. C. 627,

are pertinent to show the difference between a fisherman's lay arrangement sufficient to constitute the captain as a

*charterer pro hac vice* and one in which the employer-employee relationship exists.

The First Circuit Court of Appeals in the *Cromwell* case stated,

“ . . . where the captain employs the members of the crew and controls all the operations of the vessel, both in purchasing supplies for the voyage, in determining where he will fish, how long, and in disposing of the catch and settling all the bills, he becomes the owner *pro hac vice* and that crew is in the employ of the master and not of the owner. (Citing cases.)”

This Court, in the *Loe* case applied the same test to determine if the fishermen were employees of the owner. Loe was appointed by the owner as “fishboss”, and one Ball as captain, each receiving a fisherman’s share of the catch plus five per cent of the boat’s share of twenty per cent. The “fishboss” and captain directed where, when and how to fish and hired the crew. The crew decided where the fish was to be sold and paid the expenses of the trip. It was held that the jury was to determine whether the entire command of the vessel was relinquished to the “charterer” and that it was error for the District Court to direct a verdict for defendant. Emphasis was placed upon the fact that Loe received a five per cent share of the boat’s share “for running the boat.” This was sufficient to justify the conclusion that in running the boat he was doing so as agent of the owner.

The “charter party” in this case limits the crew to selling and delivering fish to appellant. It is appellant’s belief that these fishermen were employees, despite the use of the language of the bareboat charter [A. 90-94] and the description of appellees’ practice [A. 292], “That we

run the boat and that we do all the hiring and firing, and that we bring in the boat as best we can—go out fishing, bring in the fish for them and that we hire the crew and we put on our own nets and when we make count on pay-day, they take so much and the boat takes so much of the shares.”

The parties are in agreement that the fishermen can quit when they choose [A. 306, 291]. DiLeva states that discharge of a fisherman exposes him to suit for wages for the balance of the season. Gerstle indicated that economic pressure from the Union prevented discharge of the fishermen.

Fishermen “on shares” are nonetheless employees entitled to seamen’s rights in the event of personal injury.

*Strom v. Montague* (W. D. Wash. 1944), 53 Fed. Supp. 548, 1944 A. M. C. 122;

*Blue Sky (Mason v. Evanisevich)* (C. C. A. 9th 1942), 131 F. (2d) 858, 1942 A. M. C. 1542;

*Nolan v. General Sea Foods Corp.* (C. C. A. 1st 1940), 112 F. (2d) 515, 1940 A. M. C. 1410.

The question of whether fishermen “on shares” were employees of the owner for tax purposes was raised in the case of

*O’Hara Vessels, Inc. v. Hasset* (D. C. Mass. 1942), 60 Fed. Supp. 672, 1945 A. M. C. 1108.

and the conclusion was reached that the owner was not entitled to a refund on the claim that they were not employees. It is to be noted here that appellant paid the social security taxes and withholding taxes for appellees, as for any other employees.

No clear position was ever taken by appellees that they were employees of appellant [A. 73-76] but the District Court at the termination of the second trial found that appellant had employed appellees [A. 42]. The Memorandum Opinion concluding the first trial found [A. 15] that they were not employees. On this point appellant agrees with Judge Hall and disagrees with the conclusion reached by Judge Harrison.

B. EMPLOYEES ON A SHARE BASIS DO NOT HAVE A RIGHT OF ACTION AGAINST THEIR EMPLOYER FOR LOSS OF TIME DUE TO A COLLISION WITH ANOTHER VESSEL COMMONLY OWNED.

To examine the proposition it is necessary to determine who is the owner of the cause of action for detention arising out of a collision, when the vessel involved is being operated "on shares." The "shares agreement" is today confined to fishing, whaling and sealing ventures but in the early days all seamen's service agreements were contingent upon the ship actually earning freight. Nineteenth century cases are therefore particularly appropriate. They hold that the sole ownership of the cause of action is in the owner of the vessel and that the crew does not have any right to sue.

In the case of

*Baxter v. Rodman* (1826), 3 Pick. (Mass.) 435, the owner of a whaler sued another whaler for the proceeds of a voyage engaged in jointly under a contract of mateship. The defendant objected urging that there was a defect of parties plaintiff because the officers and crew "on shares" on plaintiff's whaler were not joined. Defendant urged that the officers and crew were co-owners



of the cause of action and therefore were necessary parties. The Court rejected the argument stating,

“That every seaman should be tenant in common with all the other seamen, the master and the owners of the vessels in all the oil which may be taken on a whaling voyage, so that no action could be brought respecting it without joining all, and none could be sued without the whole, giving every seaman a right to discontinue the action, or to release the claim, or to receive payment for the whole, would be a state of things not suspected by the enterprising men who have carried on the whale industry. But we think it is not the law.”

In the case of

*Grozier v. Atwood* (1826), 4 Pick. (Mass.) 234, the converse case was presented. The officers and crew “on shares” joined with the owners in an action to recover their claimed share of a joint voyage with another whaler. The Court nonsuited plaintiffs because there was a misjoinder of parties plaintiff (officers and crew) who had no right to sue, alone or with the owner.

In the case of

*Lewis v. Chadbourne* (1865), 54 Me. 484, the “proceeds of the voyage” were mackerel caught on a voyage during which the plaintiff was a fisherman “on shares.” The Court held that the fisherman had no right to sue a sheriff because of a loss sustained when an attachment was lost through the sheriff’s neglect. The theory was that the *sole* right to sue for the proceeds of the voyage in this kind of case was in the owner of the vessel.

The respondent in the case of

*Taber v. Jenny* (D. C. Mass. 1856), 23 Fed. Cas. (No. 13720) 605,

accomplished the incredible feat of stealing a whale. The owners of the whaler sued the converter who urged that the crew members of the vessel who had been working "on shares" were necessary parties who had not joined. The Court held that the *sole* right to recover for the proceeds of a voyage on shares was in the owner and that the seamen have only the right to share in the "net avails." Of course, the owner has the duty to pursue the wrongdoer, said the Court, because otherwise, the seaman could obtain no redress. "*He could maintain no action for it.*"

This Court, in the case of

*The Lydia (U. S. v. Laflin)* (C. C. A. 9th, 1928), 24 F. (2d) 683, 1928 A. M. C. 700,

cited the preceding cases with approval in deciding that the owner of the vessel could sue for and recover the entire proceeds of a voyage on shares, more specifically damages for interference with a whaling voyage. The owner of the vessel sued the United States for lost profits of a voyage with which a Navy patrol interfered. The United States offered, as a partial defense, the argument that damages to the owner should be reduced by the amount which the owner would have to pay the crew under the lay or share agreement. This Court rejected the argument stating,

"It is well settled that in whaling ventures the sailors who have a certain lay or share in the proceeds as wages are never regarded as partners with the owners, though they may participate in the profits of the voyage, and *it is equally well settled that neither*

*the officers nor members of the crew may join with the owners in a recovery of the proceeds of the voyage, and that the owners of the vessel and the projectors of the voyage are the owners of the products thereof.”* (Italics added.)

The Court goes on to show that the very reason that the owner alone can sue is because the crew have no right to sue on their own behalf—they have no “title” to the cause of action.

The Court adds that the owner, having sued a third party and recovered for damage to or loss of the catch, holds the proceeds of the suit just as he holds any other proceeds of the voyage, in trust, to divide with the crew members in accordance with their contractual rights to share in the “net avails” of the voyage. The trust *res* in this situation is either the amount recovered from the third person or the cause of action against him. The rights of the fishermen to share in these proceeds stems from their contract of employment, the “charter party” (“5. The net proceeds earned by the said vessel . . . shall be divided . . .” [A. 91]), under the terms of which they were operating [A. 95]. If the owner prosecutes a cause of action against a third party and recovers, the fishermen’s shares are determined by the amount thus realized. If the owner recovers nothing, because he has no cause of action against the third person, the fishermen likewise can make no recovery. Their rights are entirely dependent upon the owner’s right of recovery. Their rights exist only through the owner, not independently of him. If the owner has no cause of action, the members of the crew have none.

In a *dictum* in the case of

*Mobile R. R. Co. v. Jurey* (1884), 111 U. S. 584,  
28 L. Ed. 527, 4 S. Ct. 570,

the Supreme Court said,

“ . . . when two ships belonging to the same owner came into collision with each other, and one of them became a total loss, it was held that the insurers of the lost ship did not, upon their payment of a total loss, become entitled to make any claim for the loss against the insured as the owner of the ship in fault for the collision, for their right existed only through the owner of the ship insured, and not independently of him.” (Citing

*Simpson v. Thompson* (1876), 3 App. Cas. 279

and

*Globe Ins. Co. v. Sherlock* (1874), 25 Ohio St. 50).

Similarly, here, where the fishermen's rights exist only through the owner and to the extent that the owner has rights, the inquiry is properly concerned with what rights the owner has, and what rights the fishermen can compel the owner to assert.

It is claimed that the layup of the BESSEMER was due to fault of the GLORIA R. If the GLORIA R were independently owned, *appellant* (not appellees) would have a cause of action against her *in rem* and against her owner *in personam*. But before appellees have any right to share in the proceeds of the vessel, *i. e.*, the cause of action, they must show that there is a cause of action. Such a showing would require appellees here to establish that appellant as owner of the BESSEMER can sue itself as owner of the GLORIA R.



Appellees will undoubtedly refer to the case of

*The Petrel* (1893), P. 320 (41 Dig. 921, 8116),

upon which they relied below. The crew of the PETREL was allowed to recover from the owner of a ship solely at fault which collided with their ship and caused loss of their personal effects. It so happened that the two colliding ships were commonly owned and they were therefore suing their own employer. The holding was that negligence of the offending ship was not negligence of fellow employees of which the crew of the ship not at fault took the risk. The Court acknowledged that there might be instances where they were fellow employees,

“for example it might [be negligence of a fellow servant] if all the ships of the same company were in the habit of meeting in the same dock and the safety of each thus became in the ordinary course of things dependent on the skill with which the other was navigated.”

Under the circumstances of this case, where appellant's fishing boats are all engaged in the common pursuit of fish “in the waters immediately adjacent to San Pedro and usually fished by vessels fishing therefrom” (see “Charter Party” [A. 90]), the Court might well have reached the opposite result. In any event we have an entirely different case. The PETREL's crew owned their personal effects. Appellant only, owns the right to sue for lost proceeds, if any such right were to arise. Appellees do not own it.

The agreement to share the “net proceeds of the voyage,” is in effect a profit sharing agreement. The proceeds and the profits belong to, and are derived from, the owner. The owner agrees to share the profits with the

crew. Before there is the duty to share the profits there must be a showing that there are profits. When two boats of the same ownership collide, the owner has made no profits. He has suffered a loss to the extent that each boat is damaged, and for the time that each boat is unable to fish. If there are no profits, either in the money value of fish, or in the fish themselves, or in a cause of action against a third person, there can be nothing to share. Nothing divided by  $18\frac{3}{4}$  is nothing. The District Court, by its decree in the second trial, created a right where none existed before, and did violence to the existing law and theory of causes of action. The Court allowed recovery simply because the fishermen had suffered a loss. Under the Court's ruling, not only must the owner bear his own loss, but he becomes liable to his crew for their share of hypothetical profits which the owner did not in fact make, but which the Court found he would have made but for the collision. This result, appellant submits, is entirely inconsistent with the contractual rights of the parties.

An entirely new and unwarranted field of recovery is opened to employees by the District Court's decree. If the decree is correct, it is authority for the proposition that the fishermen should recover for loss of fishing time if through negligence of their own navigator the vessel grounds, or if the engineer fails to keep the engine operating and the vessel has to return to port. The fishermen have likewise then lost their opportunity to fish. If any employee on wages, fixed or contingent, is unable to work due to damage caused by accident in another department, he also has suffered a wage loss. If we assume that the BESSEMER, instead of running into the GLORIA R, had run into appellant's fish conveyer and damaged it throw-

ing appellant's cannery employees out of work for a week, during repairs, appellant could be held liable for damages to the employees for their loss of a week's wages, if the reasoning of the District Court is correct.

Appellees were at any time entitled to quit [A. 306]. It follows, even though their discharge might bring economic pressure from their union, that the owner could, as a matter of law, fire them at any time or discontinue fishing. Appellant offers to the Court the thought that the "shares arrangement" was in effect a relationship in which there was a rather loose contract of employment in which the fishermen were never obligated to fish at any time. They could fish or stay home as they chose [A. 294]. As can be seen from Respondents' Exhibit B, Ivan Jurjev was not aboard during the period covered by deliveries of October 14th to October 18th and the division was on an  $18\frac{3}{4}$  shares basis. From October 19th to October 25th there were fourteen crew members and  $19\frac{3}{4}$  shares. October 27th and October 28th deliveries were not shared by Pietro Colombo. They "missed the boat" for one reason or another, and did not share the profits for those periods. The very informality of the arrangement, even when it is examined in the light of the "Charter Party," shows that the fisherman's wage is entirely contingent upon profits being earned. The hazards and uncertainties of fishing make any other arrangement unsatisfactory. "All sardine boats are run that way," says Witness Gerstle [A. 298]. Analysis of the contract shows it to be by no means a guaranty on anyone's part that the fishermen will fish or that they will earn anything. Therefore while the vessel was out of service for eight days, there was nothing to prevent appellees from seeking other employment.



Nor is there any obligation, express or implied, for appellant to do more than allow appellees to use the boat when it was available. Appellant can elect to tie up the boat for maintenance, bottom painting, or repairs without incurring any liability. Surely the contract should be construed so that each of the parties to it have the same right not to take the vessel out or not to have the vessel engage in fishing. If, for instance, appellant had enough fish at any time, and decided that all or some of its vessels should not go fishing for a certain period, can appellees or any of the other fishermen in the fleet sue for lost wages during their lay-off? There is no difference between the situation in which the boat is not available to appellees because of alleged negligence of another boat of appellant's fleet, and a situation in which it does not fish because of lack of cannery facilities, or breakdown for any cause, including negligence, which results in the boat's catch not being required. Appellant takes the risk of appellees' willingness to fish on any given day. Appellees, likewise, take the risk of the availability of the boat for any given time.

C. BOTH BOATS WERE OPERATED UPON THE SAME SHARE ARRANGEMENT AND BOTH CREWS HAD THE SAME RELATIONSHIP TO APPELLANT.

Witness Gerstle indicated [A. 177, 179, 306] that *all* sardine boats are operated under the identical "shares" plan, the only variant being the number of shares which changed with the number of the crew members. Anthony



DiLeva (GLORIA R) states [A. 239] that their regular boat was broken down and they were “just chartering” the GLORIA R during repairs.

This factor explains much of appellees’ vacillation as to their exact status. Appellees realized the dilemma presented. To establish liability upon appellant (and cash in, at the owner’s expense, on the alleged negligence of their own relatives), the master and crew of the GLORIA R had to be shown to be appellant’s employees. Appellees, then also must be considered employees, and under the consistent holding of the “share agreement” cases the employees had no right to sue. If appellees were “charterers” or employees of a “charterer,” the GLORIA R crew were also not employees. Appellant is then not liable to appellees, because the doctrine of *respondeat superior* would not apply.

Judge Harrison concluded that both crews were employees of independent contractors, but instead of dismissing the action against appellant, allowed appellees to *amend* by bringing in the “charterer” of the GLORIA R. Appellant considers this procedure to be erroneous because an action brought against an improper defendant or respondent should be dismissed.

Judge Hall, after no evidence whatsoever was introduced concerning the alleged “charterer” of the GLORIA R, dismissed as to him but found both crews to be employees of appellant. Judge Hall’s decree is erroneous because it is directly opposed to the “shares agreement” cases quoted with approval by this Court in the *Lydia* case (*supra*).

III.

**Appellees Have No Cause of Action Against Appellant Because of the Specific Provision of the "Charter Party," Barring Claims for Loss of Use.**

Assignments of error applicable:

VIII. The Court erred in denying respondent Van Camp Sea Food Company, Inc.'s motion to dismiss this action against this respondent.

X. The Court erred in not dismissing this action as to respondent Van Camp Sea Food Company, Inc., at the termination of first trial [126] of this cause.

XI. The Court erred in permitting a second trial of the same matter as to respondent Van Camp Sea Food Company, Inc., after a complete prior trial upon the same issues.

XVI. The Court erred in its conclusion of law that respondent Van Camp Sea Food Company, Inc., is liable for negligence of the master and crew of the GLORIA R and that the collision between said vessel and the BESSEMER was directly and proximately caused by negligence of the master and crew of the GLORIA R.

XVII. The Court erred in its conclusion of law that libellant [127] is entitled to recover from respondent Van Camp Sea Food Company, Inc., the following sums on behalf of himself and the following crew members as damages and loss of earnings:

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Anthony DiLeva (master)	363.53
Salvatore DiLeva (net shares)	621.65

Appellant refers specifically to the provisions of the "Charter Party" set forth at pages 90 to 94 of the Apostles. Anthony DiLeva (BESSEMER) testified definitely that appellees took the BESSEMER on September 11, 1941, under the agreement, continued to run the vessel until the agreement expired by its terms and thereafter operated in accordance with the agreement [A. 95]. No other agreement was ever made with appellant [A. 89, 94, 95]. Counsel for appellee stated [A. 209] that the agreement continued in force, on oral understanding, and that there was no different subsequent agreement.

The "Charter Party" provides [A. 93]:

"8. Neither party shall be liable to the other for any loss of time or other damage, other than damage to the vessel or machinery, caused by the loss of use of the vessel by any reason whatsoever including defects to hull or machinery."

It is signed by appellant and appellee, Salvatore DiLeva.

In considering this clause it is not necessary to determine whether the agreement operates as a true bareboat charter or merely as an employment agreement cast in the general form of a bareboat charter. In either event it is an agreement made freely and voluntarily between the parties. Part of the consideration for the agreement was this covenant against liability for detention damage given by appellee, Salvatore DiLeva, to appellant.

The final decree [A. 46] from which this appeal is taken is in favor of appellee, Salvatore DiLeva, who in the Fifth Amended Libel [A. 17] sued on behalf of the crew members. Their rights, if he is a "charterer" proceed through him and are no better than the right he asserts to sue for detention damage. If they are employees of appellant, it is nowhere asserted, nor can it be, that the relationship between appellant is different from the relationship specified in the written agreement. Quite definitely the position is maintained that the written "charter party" identified and governed their operations. It was the "same thing; yes, all the time. All the way through" [A. 95].

Appellees' rights to a share of the net proceeds of the catch of the vessel, if any exist, arise out of contract. The parties by specific agreement having provided that "loss of time or other damage . . . caused by the loss of use of the vessel by any reason whatsoever" shall not



be an item for which appellant shall be liable, no cause of action for this very damage can now be asserted without destroying the contract. Appellees cannot on the one hand urge that part of the contract is in force to give them the right to shares and on the other that the balance of the contract is ineffective.

If the "charter party" actually created a bareboat charter relationship between appellant and appellee, Salvatore DiLeva, the right to sue is likewise defined by the agreement. Salvatore DiLeva, then the owner of the vessel *pro hac vice*, has title to the cause of action of his crew members. But, this cause of action is for detention damage, and, specifically, an item for which appellant was agreed not to be liable. Therefore, Salvatore DiLeva, neither for himself nor for his employees, has any right to maintain this action. If we assume that the BESSEMER'S crew were employees of a "charterer" it follows that the crew of the GLORIA R, being on an identical shares arrangement with appellant, are also employees of an independent contractor, Gennaro DiLeva. He, not appellant, would be liable. This is the view taken by Judge Harrison after the first trial. Appellees were given the opportunity of asserting this position in the second trial. Not having done so, the action against Gennaro DiLeva was dismissed because "his name has not been mentioned by any of the witnesses" [A. 133].

IV.

**The District Court Erred in Finding That the Gloria R Was in Sole Fault for the Collision.**

Assignments of Error applicable:

I. The Court erred in finding that it is true that the BESSEMER was proceeding, at the time of the collision referred to herein, with all running lights burning.

II. The Court erred in finding that it is true that at the time of the collision the BESSEMER was ready to make a set but had not commenced to make the set nor lowered the net to the skiff.

III. The Court erred in finding that the GLORIA R was negligent or that her master or her crew was negligent in their operation or navigation of said vessel at or prior to the time of said collision between the BESSEMER and the GLORIA R, in turning and crossing the bow of the BESSEMER or in any other respect.

IV. The Court erred in finding that the collision between the BESSEMER and the GLORIA R was directly and proximately or in any other manner caused by negligence of the GLORIA R.

V. The Court erred in finding that as a proximate result of such alleged negligence, the BESSEMER was laid up for repairs.

XVI. The Court erred in its conclusion of law that respondent Van Camp Sea Food Company, Inc., is liable for negligence of the master and crew of the GLORIA R and that the collision between said vessel and the

BESSEMER was directly and proximately caused by negligence of the master and crew of the GLORIA R.

XVII. The Court erred in its conclusion of law that libelant is entitled to recover from respondent Van Camp Sea Food Company, Inc., the following sums on behalf of himself and the following crew members as damages and loss of earnings:

Ivan Jurjev	\$239.22
Mario DiLeva	239.22
Mike DiLeva	239.22
Jack Olsen	239.22
Marino Transatti	239.22
Angelo Castagnola	239.22
Chigi Romolio	239.22
Salvatore Carnevale	239.22
Matteo Bologna	239.22
Pasquale Guglielmo	239.22
Pietro Colombo	239.22
Salvatore DiLeva	239.22
Anthony DiLeva (master)	363.53
Salvatore DiLeva (net shares)	621.65

In considering this question appellant recognizes that two District Judges have heard the oral testimony of the witnesses and have reached a conclusion opposed by appellant. Appellant accepts the burden of showing that this conclusion is manifestly erroneous. Both District Judges committed errors of law, which are sufficient to require reversal. The BESSEMER is chargeable with statutory vio-

lations which it must be shown, not only did not cause the collision but *could not* have caused the collision:

- A. The BESSEMER had no lookout whose sole duty was to be alert for other vessels.
- B. The BESSEMER failed to exercise due care in a special circumstances situation.
- C. The BESSEMER failed to exhibit a white masthead light as required by Article Two of the International Rules.

In discussing the question of liability appellant points out that appellees have chosen not to produce their wheelsman, appellee Salvatore DiLeva, nor their engine controls operator, appellee Mike DiLeva, nor the man on the bow, appellee Chigi Romolio. At the first trial Salvatore DiLeva was conveniently ill [A. 292], Chigi “could not come” [A. 233] and no explanation for Mike DiLeva’s absence was offered. At the second trial Salvatore DiLeva was “in the mountains” [A. 103]. No suggestion was made that the other two essential witnesses were not available. While it may be quite possible that the testimony of these witnesses, whom appellant did not call, may have corroborated in every detail that of the mastman, it seems more than mere coincidence that on neither of two occasions were we able to hear from three men in “key” positions. Surely in the seventeen months between the two trials they were available for depositions. This is not a situation such as this Court had before it in the case of the

*Eureka* (C. C. A. 9th, 1935), 80 F. (2d) 303, 1935  
A. M. C. 1560,

in which the facts, in the main, were undisputed, but a case in which a sharp conflict exists, and one in which the



Court should have been entitled to question the helmsman, controls operator and bowman of *both* vessels as to what they did. Appellant offered the oral testimony of the men in the corresponding position on the GLORIA R. Having chosen not to produce these men, appellees cannot complain if this Court should presume their testimony to be unfavorable.

*The Cananova* (E. D. Pa., 1923), 297 Fed. 658, 662.

A. THE BESSEMER HAD NO LOOKOUT WHOSE SOLE DUTY WAS TO BE ON THE ALERT FOR OTHER VESSELS.

Article 29 of the International Rules (33 U. S. C. A., Sec. 121) provides:

“Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof from the consequences of any neglect . . . to keep a proper lookout. . . .”

In the case of the

*Arkansas-Knoxville City* (C. C. A. 9th, 1940), 112 F. (2d) 223, 1940 A. M. C. 562,

this Court stated that it would follow the rule of

*The Ariadne* (1872), 80 U. S. (13 Wall.) 475, 20 L. Ed. 542,

*i. e.*, “A lookout must be a free and single minded lookout.” This principle was reasserted in the case of

*Koyei Maru-David P. Fleming* (C. C. A. 9th, 1938), 96 F. (2d) 652, 1938 A. M. C. 885.

See also the cases of

*Wilders S. S. Co. v. Low* (C. C. A. 9th, 1901), 112  
Fed. 161, 172,

in which absence of a lookout to see what was there to be seen was characterized as approaching “very nearly the line of reckless navigation”;

*Union S. S. Co. v. Latz* (C. C. A. 9th, 1915), 223  
Fed. 402, 411,

where the failure of a lookout was held to be a “grievous fault for which the vessel will be rendered liable”; and the case of

*The Catalina (Wilmington Trans. Co. v. Edwards)*  
(C. C. A. 9th, 1938), 95 F. (2d) 283, 1938  
A. M. C. 485,

in which it was reiterated that a “competent and vigilant lookout stationed at the forward part of the vessel and in a position best adapted to descry vessels approaching at the earliest moment is indispensable to exempt the steamboat from blame in case of an accident in the nighttime, while navigating waters on which it is accustomed to meet other water craft.”

Applying these well defined rules to the *BESSEMER*, we find that the mastman’s “job” was to “look for fish” [A. 98]. Appellee DiLeva, the mastman, indicated that he was quite interested in getting the fish he was pursuing, was looking at the fish and the *GLORIA R* simultaneously [A. 99]. Appellee Carnevale, who was on the pilot house, was also watching the fish [A. 233, 128, 116]. The entire crew was also definitely interested in the school of fish [A. 271]. The wheelsman’s duty was to follow the orders of the mastman [A. 127]. Presumably the bowman is

also on the lookout for fish. The entire picture on the BESSEMER is one of intense concentration on capturing the school of fish, with no care or concern for other vessels in the vicinity.

What, then, of the duty of the lookout which is of "the highest importance"? We say with the Supreme Court in the *Ariadne (supra)*:

"Every doubt as to the performance of the duty and the effect of nonperformance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony condusive to the contrary."

B. THE BESSEMER FAILED TO EXERCISE DUE CARE IN A SPECIAL CIRCUMSTANCES SITUATION.

Article 29 of the International Rules (33 U. S. C. A., Sec. 121) is the general precautionary rule, providing:

"Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof from the consequences of . . . the neglect to carry . . . signals . . . or of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstance of the case."

If this is a special circumstances situation rather than a crossing situation the BESSEMER is at fault in performing the admittedly unusual clockwise circle rather than the expected counterclockwise maneuver, without care for the proximity of the GLORIA R. We can see no justification for abandoning all precaution in their anxiety to capture the school of fish they were pursuing.

The BESSEMER failed to give adequate or any warning that she was "on fish." It is admitted that the BESSEMER had no light of any kind or color on its masthead. The GLORIA R witnesses are positive that the "San Pedro custom" requires a red light on the mast during circling operations to indicate that the boat is "on fish" [A. 142, 154, 163, 165, 171, 245, 251, 282, 288]. The BESSEMER witnesses indicate that the red light is lighted only when the net is being lowered [A. 96, 117, 231, 257]. Some indication of why the BESSEMER preferred not to light her red masthead light appears from the testimony of Salvatore Carnevale [A. 118], who says that showing a red masthead light is likely to attract to the area other vessels which might prove unwelcome competitors.

While as we shall see in the discussion under the next subdivision, the red masthead light has no propriety under the International Rules, its only possible purpose would be to give a warning to other vessels to keep clear, and the BESSEMER's failure to give such warning can hardly be justified by the fear that it might be taken as an invitation to come over and share her prospective catch.

#### C. THE BESSEMER FAILED TO EXHIBIT A WHITE MASTHEAD LIGHT.

Article 2 of the International Rules (33 U. S. C. A., Sec. 72) provides:

"A steam vessel when under way shall carry—(a) on or in front of the foremast . . . a bright white light . . . of such a character as to be visible for five miles."



No argument is made that the BESSEMER had such a masthead light [A. 230]. In fact, the reason is advanced [A. 118] for not having such a light, that it “shines too much white” and the phosphorescence of the fish cannot be seen.

This Court in the case of

*Martindale-Yankee Clipper (Kaseroff v. Petersen)*  
(C. C. A. 9th, 1943), 136 F. (2d) 184, 1944  
A. M. C. 701,

condemned in no uncertain terms the practice or custom of fishing without a white masthead light. It is to be noted that the MARTINDALE was *preparing* to set her net (just as was the BESSEMER) when she exhibited her red masthead or “setting” light. But the BESSEMER showed no light whatsoever! If a red light was not the equivalent of or substitute for the statutory requirement, what of the situation when *no* light is shown! This Court applied the rule of the

*Pennsylvania* (1874), 86 U. S. 125, 136, 22 L. Ed. 148,

and found that the MARTINDALE had the burden of proving not only that the statutory violation did not contribute, but also that it *could* not have been one of the causes of the collision. Both vessels, having committed the same violation, were held to be in mutual fault.

In this case it is obviously impossible for the BESSEMER to show that her failure to obey the law with respect to her masthead light could not have contributed to the col-

lision. Such a light would surely have assisted in determining the position and course of the BESSEMER. If fishermen choose to disregard the rules because it interferes with their fishing, they must accept the consequences of their conduct. If the law is burdensome to them, they must obtain relief from Congress. They cannot expect the courts to exonerate them from deliberate violations of express statutory requirements.

No particular issue was made by appellees in the case at bar as to the masthead light on the GLORIA R. The implication from the testimony of the master of the GLORIA R [A. 239] is that her lights consisted of "just the running lights, starboard and port lights." If we assume that the GLORIA R was also following the custom of running without a white masthead light, the reasoning of the *Martindale-Yankee Clipper* case (*supra*) should require a finding that both vessels were at fault, and that the District Court erred in finding sole fault upon the GLORIA R.

V.

**If the Court Regards the Vessels in Mutual Fault  
Recovery of Half Damages Is the Most That  
Could Be Allowed.**

Assignments of Error applicable:

VII. The Court erred in finding that the loss of earnings, proximately caused by the layup of the BESSEMER, was the sum of \$239.22 to each of twelve crew men, the sum of \$363.53 to the master, Anthony DiLeva, and the sum of \$621.65 to the owner of the net on the BESSEMER, Salvatore DiLeva.

In

*Halsbury's Laws of England*, 2d Edition (1938),  
Vol. 30, p. 865, Sec. 1146,

under the heading "Crews on Vessels" appears the statement,

"The Master and crew of a vessel, who lose their effects by reason of a collision due to the negligence of some of them, cannot recover the value from the owners of their own vessel, because of the doctrine of common employment (*Priestly v. Fowler* (1837), 3 M. & W. 1; *Hedley v. Pinkney & Sons S. S. Co.* (1894), A. C. 222, 41 Dig. 297, 1591). If the collision is due to the fault of both vessels, they can apparently, even if they are wrongdoers, just like their own wrongdoing owner, recover from the owner of the other vessel if his vessel was in fault; and the amount of damage by which the proportion of the other vessel's fault exceeds the proportion of their

own vessel's fault. (Maritime Convention Act 1911 (1 & 2 Geo 5 C 51 S 1 (1) 'or to any property on board').

"If the other vessel is alone to blame, they can recover the full value even though both colliding ships belong to the same owners (The Petrel 1893 P. 320; 41 Dig. 921, 8116). If their vessel was not to blame, but the collision is the fault of two or more other vessels, the Maritime Convention Act applies and it has yet to be decided whether they are entitled to recover from the owners of each of the other vessels in full or only in proportion to the degree in which each vessel was at fault."

In the case of

*In re Lakeland Transportation Co.* (E. D. Mich., 1900), 103 Fed. 328, 336 (modified on other grounds (C. C. A. 6th, 1901, 111 Fed. 601),

the master and crew of a vessel in mutual fault, were entitled only to half damages because they were "tainted with the fault of their vessel."

In the case of

*The City of New York* (S. D. N. Y., 1885), 25 Fed. 149,

recovery of half damages for personal effects was allowed the master and crew because they were chargeable with the fault of their own vessel.



To the same effect are the cases of

*The Livingstone* (W. D. N. Y., 1900), 104 Fed. 918, 924 (reversed on other grounds (C. C. A. 2d, 1902), 113 Fed. 879);

*The Queen* (S. D. N. Y., 1889), 40 Fed. 694.

In the case of

*The Niagara* (S. D. N. Y., 1896), 77 Fed. 329 (affirmed (C. C. A. 2d, 1898) 84 Fed. 902),

recovery was likewise limited to half damages from the other vessel, but because the fault of their own vessel consisted of unseaworthiness, in the lack of a mechanical fog horn, which existed at the beginning of the voyage, the crew was entitled to recover from their own owner for the other half of their damage.

The foregoing cases, it is to be noted, involve a situation in which there is no question as to the title of the master and crew to their personal effects and to their right to sue. In the case at bar there is no showing of such a right to sue or "title" to the claim for lost profits. But even accepting for the sake of argument, the assumption that a recovery can be made of detention damages arising out of a collision with a vessel belonging to the same owners, where as here, the collision was due to the fault of both vessels, half damages, not full damages, would be the limit of such recovery.

VI.

**The District Court Erred in Computing Damages.**

Assignments of Error applicable:

VII. The Court erred in finding that the loss of earnings, proximately caused by the layup of the BESSEMER, was the sum of \$239.22 to each of twelve crew men, the sum of \$363.53 to the master, Anthony DiLeva, and the sum of \$621.65 to the owner of the net on the BESSEMER, Salvatore DiLeva.

One minor objection to the final decree to which we refer in passing is that it is indefinite in that it does not purport to be in any final amount. The decree requires that lawful social security taxes and withholding taxes be deducted. This is in accordance with the ruling of this Court in the case of

*Resukich v. City of Avalon* (C. C. A. 9th, 1946),  
156 F. (2d) 500, 1946 A. M. C. 1009.

While computation of the specific sums intended may be only a mechanical matter, it would seem necessary that the final decree be for a specific sum. Satisfaction of the decree can be then entered upon payment of a sum certain.

The error in computing damages is much more fundamental. The libel seeks recovery for loss of eight fishing days [A. 20]. The answer admits that the BESSEMER was laid up for a period of eight fishing days. The District Judge, at the suggestion of counsel for appellees [A. 196], determined that ten calendar days were lost. Actually there were nine calendar days lost from October 4, 1944, because the boat fished on October 13, 1944, and made a delivery on October 14, 1944 [A. 131]. Sardine boats do not fish on Saturday nights or Sunday mornings because

the canneries are not open for deliveries on Sundays. The actual lost nights consequently are October 4, 5, 6, 8, 9, 10, 11 and 12 or a total of eight nights. This amounts to an error of twenty per cent.

The District Court preferred to fix damages rather than to refer them to a Commissioner.

The Court assessed damages by the following method [A. 194]:

1. The BESSEMER's catch for the balance of October (896,850 pounds) and the entire month of November (1,047,450 pounds) was totaled to obtain the figure of 194,430 pounds [A. 200].
2. This figure was divided by 45 as the approximate number of calendar days for that period [A. 200] to get an average daily catch of 43,206 pounds.
3. The average daily catch was multiplied by ten (not nine) calendar days to get 432,000 pounds or 216 tons, lost during the layup period [A. 196].
4. This figure was multiplied by \$22, the market price per ton for sardines [A. 86], to get the sum of \$4,752 as the gross loss.
5. Counsel were ordered to compute the expenses and arrive at a figure representing the net loss before taxes [A. 198, 205], divide it by  $18\frac{3}{4}$  shares, give  $2\frac{1}{2}$  shares to appellee Salvatore DiLeva for the net, 12 shares to the crew,  $1\frac{1}{2}$  shares for the master, and  $2\frac{3}{4}$  shares to appellant for the boat [A. 199].

Counsel for appellees in a Memorandum on Damages (not printed in the Apostles) used an agreed operations cost figure of \$406.55 for the 45-day period (Oct. 14 to Nov. 30) divided it by 45, multiplied by 10 to get a cost

of fuel for 10 days of \$90.34. This figure, deducted from \$4,752, resulted in an amount of \$4,661.66.

Dividing by  $18\frac{3}{4}$  gave \$248.62 per share. Groceries for 45 days cost \$550, or \$12.22 per day for 13 men or \$.94 per man per day. Deducting \$9.40 from each share for 10 days' groceries amounted to \$239.22 per share. The master's share was one crew man's share plus one-half share (which was charged with no groceries) or \$239.22 plus \$124.31 or \$363.53. The net's share was  $2\frac{1}{2}$  times \$248.62 or \$621.65.

The Findings of Fact, Conclusions of Law and Final Decree, signed by the District Judge exactly as prepared by appellees' counsel, awards damages in the above amounts [A. 41-47].

Counsel for appellant, also in a Memorandum on Damages (not printed in Apostles), pointed out that only nine calendar days were involved from October 4th to October 12th, inclusive. (The BESSEMER fished on October 13th and made a delivery of her catch on October 14th [A. 131].)

Using the District Court's formula (which appellant considers erroneous), based on a 45-day period, the total net recovery should be \$2,521.34. Actually there are 48 calendar days in the balance of October and the month of November. Using the 48-day period as a base, the net recovery should be \$2,346.24. The detailed computations appear in the Memorandum on Damages, annexed hereto as an Appendix, for the Court's convenience.

Detention damages in the "highly speculative pursuit of sardine fishing" should properly be proved with a reasonable degree of certainty.

*Sunlight-St. Mary* (N. D. Cal., 1936), 1936 A. M. C. 755.



The testimony of appellee Anthony DiLeva [A. 85] is particularly unsatisfactory as proof to a reasonable degree of certainty. He says that other vessels were coming in loaded, the fishing was good "that season" and, in response to a leading question to an interested witness, agreed with counsel that there was "very good fishing" that week. In the first trial [A. 310] the fish were "running heavy" and "We saw them all come in loaded" with sardines during that period of time. On cross-examination it was admitted that their boat often "misses" even on days when other boats catch full loads. The only remaining evidence purporting to prove damages is Libellant's Exhibit No. 3 [A. 130, 131, 132]. It shows (1) the total gross delivery of sardines in the Los Angeles area of 66,389,680 from October 4, 1944, to October 13, 1944; (2) total deliveries for October, November and December, 1944, by 89, 89, and 92 boats respectively; (3) the BESSEMER's deliveries for October (total and daily), November and December, 1944.

The probable catch of the BESSEMER for October 4th to 12th, inclusive, was estimated by computation based upon its catch during the succeeding one and one-half months.

In the case of

*The Lansing* (C. C. A. 9th, 1931), 51 F. (2d) 466,  
1931 A. M. C. 1470,

this Court refused to approve a similar computation as not "legally sound," "in a measure speculative" and "that there was no legally recognizable standard on which the award could be allowed." There, a whaler was allowed recovery in the District Court for six days' lost time, based upon the catch for the following six days. The whaling venture was in untried waters but the case is

leading for the proposition that proof must be made with certainty in detention damage cases and that such proof cannot be based on subsequent operations. This Court reversed the District Court for failure to prove detention damage.

In the case at bar there is no showing of catches, during the period, of other vessels of similar size and type in the same area. Exhibit 3 [A. 130] shows that a total of 89 vessels fished on all or some of the days of October. The size and type of these vessels does not appear nor do the days that they fished. It may take in too much territory to say, with appellee Salvatore Carnevale [A. 117], that "there were only two boats in a hundred miles of ocean," but he "never seen any boats all night just the two boats." Surely, however, in the waters adjacent to San Pedro there were not many boats fishing that night. Too many intangibles enter into the picture to make the proof offered at all satisfactory. Reference to

*The World Almanac* (1944 Edition)

shows the following lunar information during the days in question:

WAR TIMES USED.

<u>Date</u>	<u>Sunset</u>	<u>Moonrise</u>
Oct. 4, 1944	6:41	8:53 p.m.
5	6:40	9:37
6	6:39	10:24
7	6:37	11:14
8	6:36	12:06 a.m.
9	5:35	1:01
10	5:33	1:55
11	5:32	2:50
12	5:31	3:45

The moon was full on October 1, 1944, and in the last quarter phase on October 8, 1944. Sardine fishing is usually dependent upon seeing the phosphorescence of the school. As the moon gets above the horizon the boats go to port, as the GLORIA R was doing, because the moonlight prevents the lookout from seeing the schools. Fishing by listening for the "flippers" is usually unsatisfactory guesswork and too uncertain to be profitable. As can be seen from the moonrise and sunset table, for a large part of the nine-day period only part of the night was available for fishing. Other variables such as fog or rough weather are serious handicaps to fishing. That some or any of these nights were calm high overcast nights (the answer to the fisherman's prayer) is nowhere shown. The fortuitous element also must be considered [A. 230]. Any inferences based upon the proof here offered is too conjectural, speculative and uncertain to be of any value whatsoever.

VII.

**Conclusion: The District Court's Decree Should Be Reversed.**

- (1) Appellees as crew members of a fishing vessel do not have a cause of action against appellant, their employer, arising out of a collision with a commonly owned vessel.
- (2) The "charter party" or agreement under which appellees claimed they were operating precludes all claims for "loss of use" of the vessel.
- (3) The GLORIA R was not in sole fault for the collision.
- (4) Damages were not proved and were assessed by the District Court on an entirely erroneous basis.

The District Court should therefore be reversed.

Respectfully submitted,

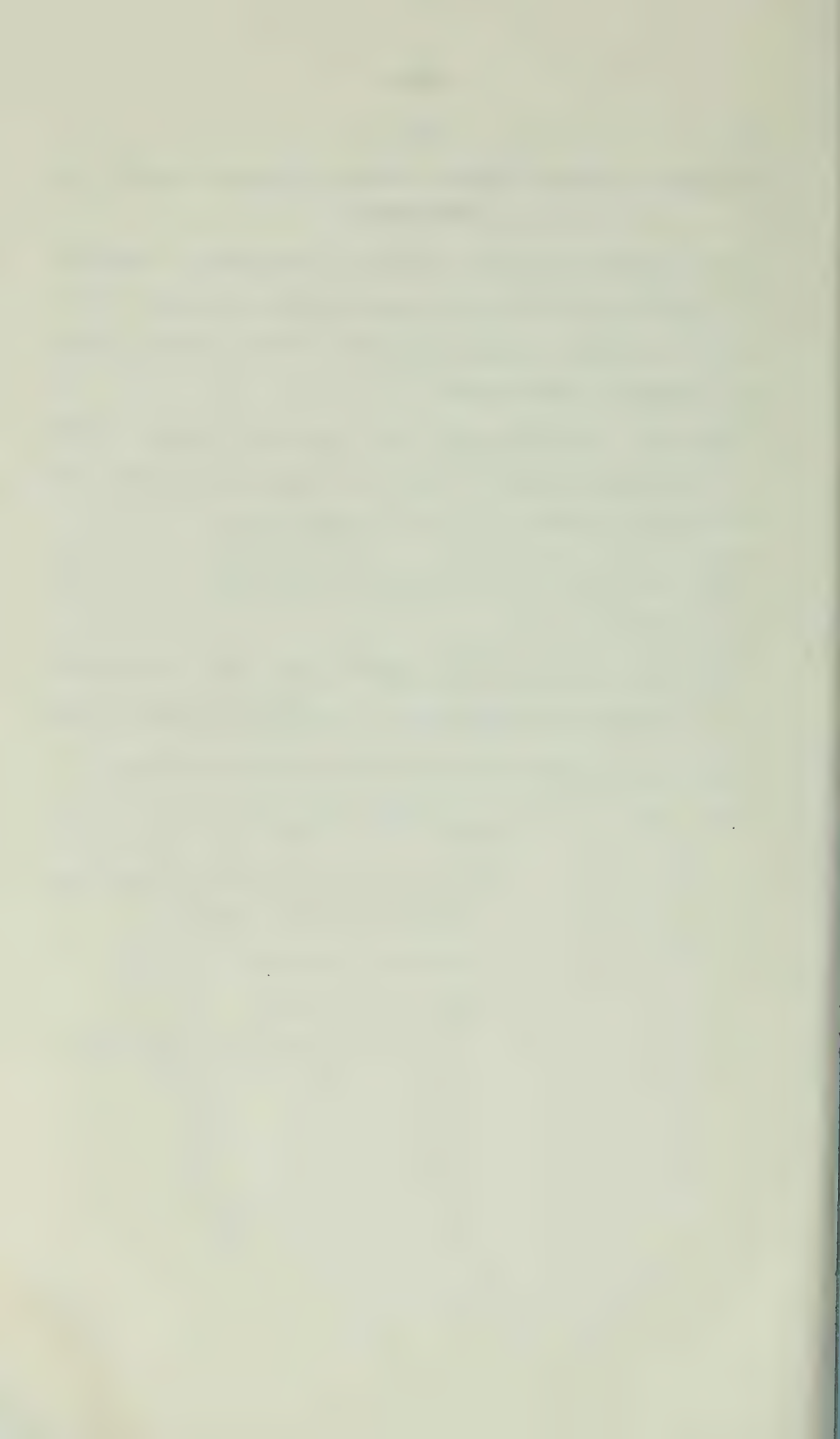
MCCUTCHEN, THOMAS, MATTHEW,  
GRIFFITHS & GREENE,

HAROLD A. BLACK,

GEORGE E. TONER,

*Proctors for Appellant.*









## APPENDIX.

[TITLE OF COURT AND CAUSE.]

Filed Nov. 6. 1947.

IN ADMIRALTY No. 4630 B.H.

### RESPONDENT'S MEMORANDUM ON DAMAGES.

After conferring with counsel for libelant and libelant subsequent to trial and opinion by the Court, no definite figures could be arrived at although some progress was made with the amounts (available in Respondent's Exhibit B) to be deducted from the gross catch as expenses of operation.

It appears that the Court has figured the estimated catch of the BESSEMER during her layup as follows:

1. The total catch of the BESSEMER for the balance of October, 1944, plus the catch for November, 1944 is to be divided by 45 days to get the average daily catch.
2. The average daily catch is to be multiplied by the number of days lost.
3. The expenses of operation are to be estimated, based on expenses of the balance of October and November, 1944, and deducted.
4. Social Security, Old Age Benefit and Withholding Taxes are to be deducted from the wages of the fishermen.

Libelant is to recover the net's share, 12 fishermen's shares, and the Master's  $1\frac{1}{2}$  share.



1. The Court computed the gross estimated catch as follows:

Catch during balance of October, 1944	896,850 lbs.
Catch during November, 1944	1,047,450 lbs.
<hr/>	
Total catch during period	1,944,300 lbs.
Divide by 45 days to get daily average	43,206 lbs.
Reduced to tons	21.6 tons.
Value at \$22.00 per ton	\$475.20

It is here to be observed that the catch of the BESSEMER during the balance of October, figured in calendar days, would be made in October over a period of 18 days from deliveries from the 14th of October to the 31st of October, inclusive. If these days are added to the 30 calendar days of November, the divisor for computing the average daily catch would be 48.

In this event the daily average catch would be 1,944,300 lbs. divided by 48 or 40,506 lbs. or 20.25 tons. The gross value of the average daily catch is \$445.50.

2. It was suggested that the number of days lost was 10. Libelant asked in his libel for the loss during eight fishing days, and respondent requested that his recovery be so limited. The Court, however, preferred to include the intervening Sunday because the daily average was figured in calendar days. With the intervening Sunday included the period is only nine days.

<u>Sailing Date</u>	<u>Delivery Date</u>	<u>Amount Delivered</u>
1. October 4	October 5	lost day
2. October 5	October 6	lost day
3. October 6	October 7	lost day
4. October 7	No fishing because no delivery on Sunday.	
5. October 8	October 9	lost day
6. October 9	October 10	lost day
7. October 10	October 11	lost day
8. October 11	October 12	lost day
9. October 12	October 13	lost day
10. October 13	October 14	delivered 60,250 lbs.

The BESSEMER's lost time began with the night of October 4, 1944, which catch would have been delivered on October 5, 1944, and terminated with the delivery date of October 13, 1944. The BESSEMER sailed on the night of October 13, and delivered 60,250 lbs. of fish on October 14th. [See record of the Fish and Game Commission, Libellant's Exhibit 2.]

In accordance with the Court's direction that the intervening Sunday be included, we count nine lost days; the gross value of the average daily catch during the layup should therefore be multiplied by 9.

3. Expenses of fuel, oil, ice, dockage and other expenses of boat operation for the months of October and

November, 1944; as taken from Respondent's Exhibit B, and as conceded by Libelant are as follows:

\$ 94.27

\$ 69.42

\$ 46.51

\$ 14.22

\$ 68.59

\$ 24.07

\$ 3.74

\$ 85.73

---

Total expenses of boat operation during balance of October and November, 1944	\$406.55
--	----------

#### COMPUTATION OF VALUE OF SHARES.

In the interest of assisting the Court to compute damages, we are listing below the various steps of the deductions to be made from the gross catch. In the left column, the amounts are figured on a 45 day basis; and in the right hand column, 48 day basis is used because the period October 14 to November 30, inclusive, is 48 days.

	<u>45 day basis</u>	<u>48 day basis</u>
Value of average daily catch	\$ 475.20	\$ 445.50
Multiply by 9 to get estimated catch during 9 day period	4,276.80	4,009.50
Fuel, oil, etc. expenses of opera- tion of boat (Oct. and Nov.)	406.55	406.55
Average daily expenses	9.03	8.47
Multiply by 9 to get estimated ex- pense during 9 day period	81.27	76.23
Deduct boat expenses from gross catch	4,195.53	3,933.27
Divide by 18.75 to get value of 1 share	223.76	209.88
Value of boat's share ( $2\frac{3}{4}$ )	615.34	577.17
Value of net's share ( $2\frac{1}{2}$ )	559.40	524.70
Value of Master's extra one-half share	111.88	104.94
Total value of provisions during October and November	550.00	550.00

(These items appear on Respondent's Exhibit B as \$276.26 plus \$315.21 but the parties have agreed that some of the items are not properly included and have agreed to the figure of \$550.00. Provisions are to be deducted only from crew's shares and not from the net's or the boat's or the Master's extra one-half share.)



	<u>45 day basis</u>	<u>48 day basis</u>
Total value 13 crew's shares before deducting provisions	\$2,908.88	\$2,728.44
Total value 13 crew's shares after deducting provisions (\$550)	2,358.88	2,178.44
Value before taxes—one crewman's		
(Divide by 13) 9 day share (	181.45	167.57
per day (	20.16	18.62
Master's (1 crewman's share plus ½ boat share) 9 day share (	293.33	272.51
per day (	32.59	30.28

TAX DEDUCTION COMPUTATION.

Value one crewman's share	181.45	167.57
Social Security and O.A.B. deduction (1% plus 1%)	3.63	3.23
	<hr/>	<hr/>
	177.82	164.34
Withholding tax		
(9 x \$3.75 per day)	33.75	
(9 x \$3.40 per day)		30.60
	<hr/>	<hr/>
Net crewman's share after taxes	\$ 144.07	\$ 133.74
	=====	=====
Master's share (1½ shares)	\$ 293.33	\$ 272.51
Social Sec. and O.A.B. (1% plus 1%)	5.87	5.45
	<hr/>	<hr/>
	\$ 287.46	\$ 267.06
Withholding Tax		
(9 x \$6.04 per day)	54.36	
(9 x \$5.60 per day)		50.40
	<hr/>	<hr/>
Value Master's share	\$ 233.10	\$ 216.66

The Court has found that the libelant is entitled to recover the following items:

Net's share ( $2\frac{1}{2}$ )  
 12 Crewmen's shares  
 Master's ( $1\frac{1}{2}$ ) share.

These amounts after deductions of expenses and taxes are:

	<u>45 day basis</u>	<u>48 day basis</u>
Net's share ( $2\frac{1}{2}$ shares)	\$ 559.40	\$ 524.70
12 Crewmen's shares (12 times \$144.07)	1,728.84	
(12 times \$133.74)		1,604.88
Master's share ( $1\frac{1}{2}$ shares)	233.10	216.66
	<hr/>	<hr/>
Total recovery	\$2,521.34	\$2,346.24

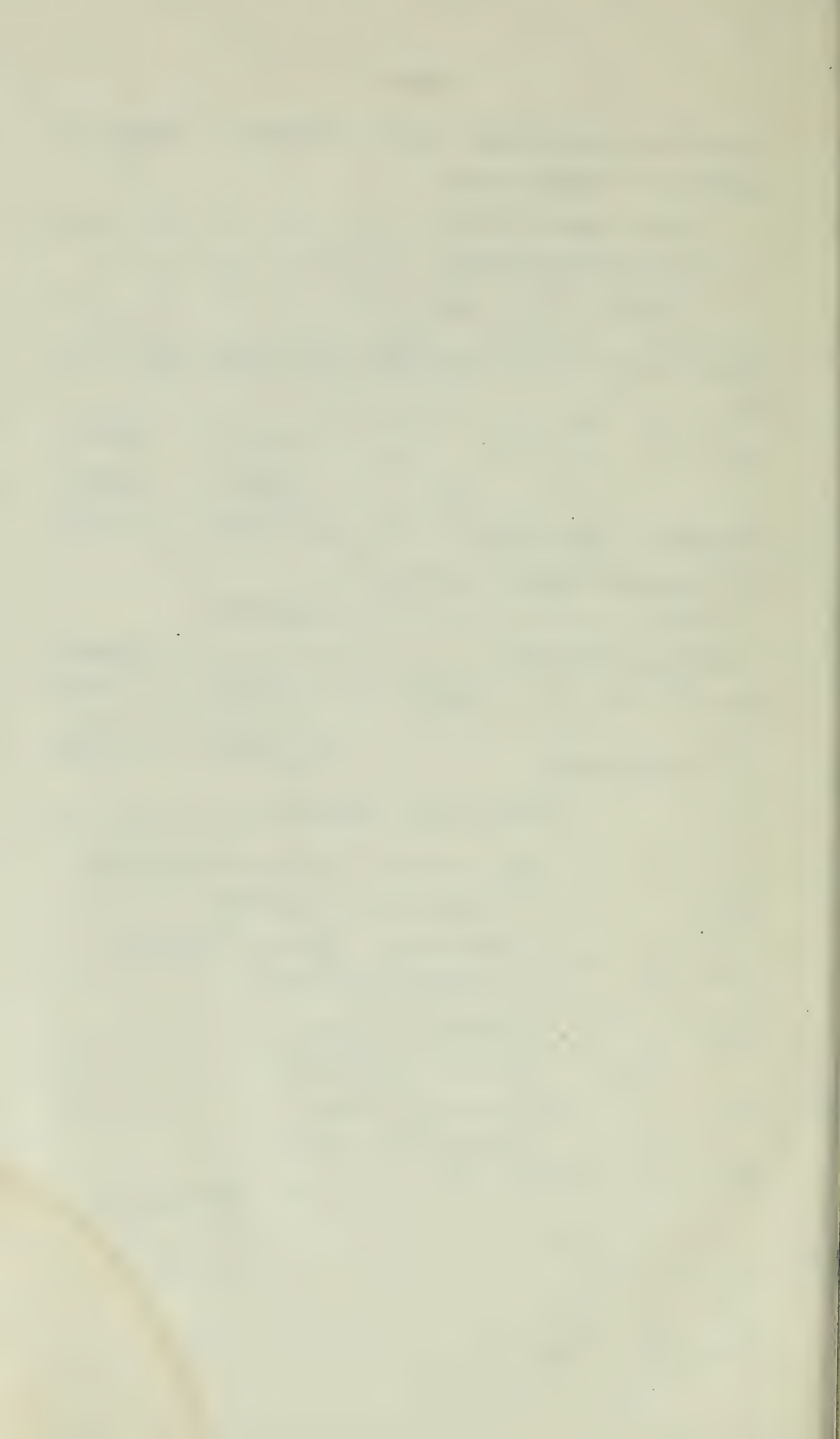
Respectfully submitted,

McCUTCHEN, THOMAS, MATTHEW,  
 GRIFFITHS & GREENE,  
 (McCutchen, Thomas, Matthew,  
 Griffiths & Greene)

HAROLD A. BLACK  
 (Harold A. Black)

GEORGE E. TONER  
 (George E. Toner)

*Proctor for Respondents.*



No. 11877.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

VAN CAMP SEA FOOD COMPANY, INC., a corporation,  
*Appellant,*

*vs.*

ANTHONY DiLEVA, IVAN JURJEV, MARIE DiLEVA, MIKE  
DiLEVA, SALVATORE DiLEVA, JACK OLSEN, MARINO  
TRANSATTI, ANGELO CASTAGNOLA, CHIGI ROMOLIO,  
SALVATORE CARNAVALE, MATTEO BOLOGNA, PASQUALE  
GUGLIELMO and PIETRO COLOMBO,

*Appellees.*

---

## APPELLEES' BRIEF.

---

HERBERT R. LANDE,  
413 West Seventh Street, San Pedro,  
*Proctor for Appellees.*





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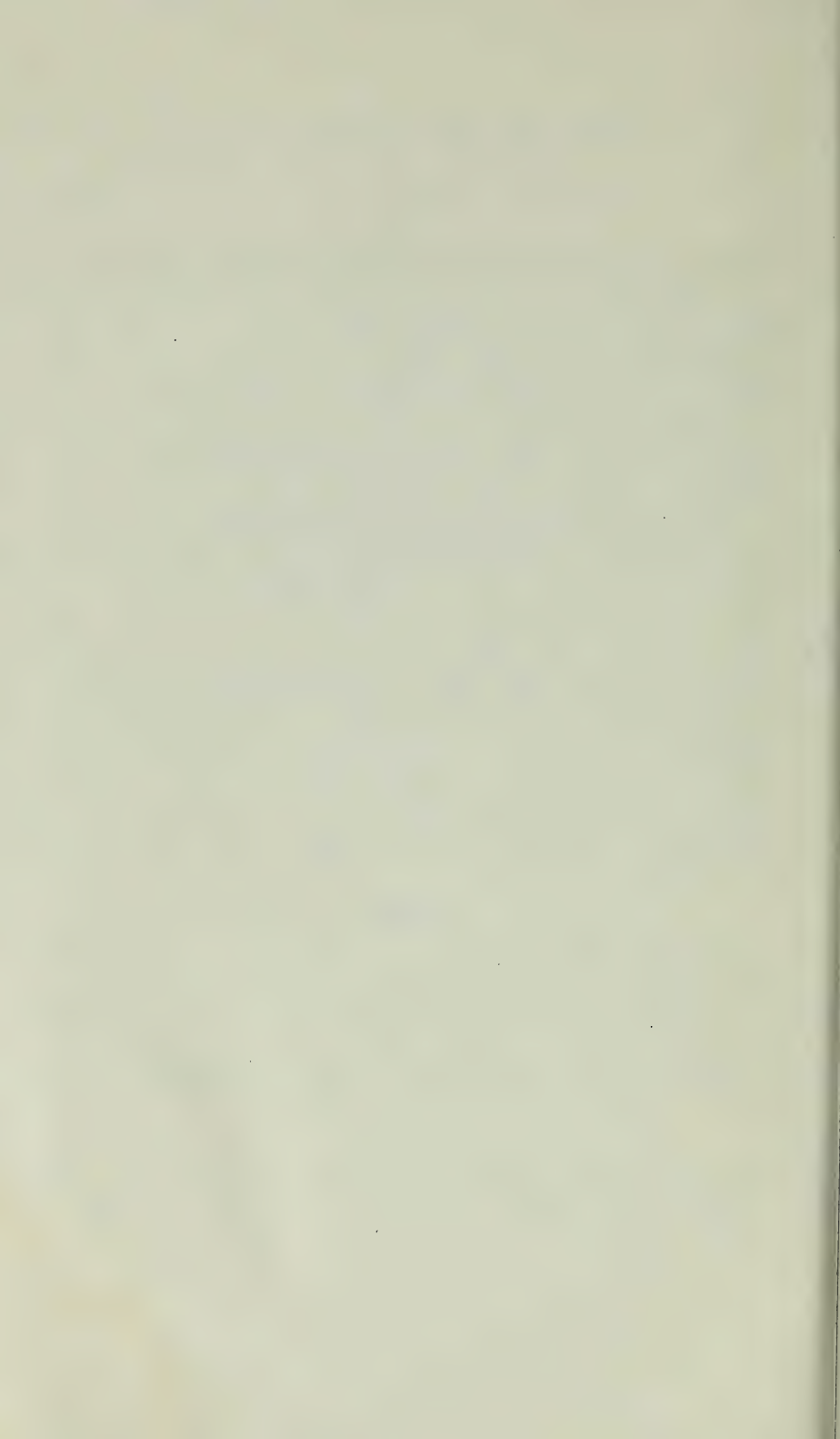
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TRANSATTI, ANGELO CASTAGNOLA, CHIGI ROMOLIO,  
SALVATORE CARNAVALE, MATTEO BOLOGNA, PASQUALE  
GUGLIELMO and PIETRO COLOMBO,

*Appellees.*

---

## APPELLEE'S BRIEF.

---

This cause was first tried by Judge Harrison in the District Court. At the conclusion of the trial, he wrote a memorandum opinion [A. 14] in which he held that the appellant's vessel, the Gloria R, was solely at fault in the collision, and further stated that it had been *intimated* that the Gloria R was chartered to third persons, and if so, that such third persons should be brought in, to the relief of appellant. The Judge did this for the benefit of appellant [A. 319], contemplating that such third persons would occupy an adverse position to that of appellant [A. 319].

therefore that issue as to the status of the Gloria R and her crew was completely eliminated from the case.

Thus the only common question of fact before the Judges was the fault of the vessels, and both Judges found the Gloria R to be at fault.

There can be but *one* set of Findings of Fact and Conclusions of Law in any case. There was only one in this case. On appeal, the facts found must be taken as true, if supported by substantial evidence.

## II.

### **The District Court Did Not Err in Holding That Appellees Had a Cause of Action Against Appellant.**

#### **A. APPELLANT WAS THE OWNER OF BOTH VESSELS AND THE EMPLOYER OF BOTH CREWS.**

The Findings of Fact, paragraphs I, II, III and IV [A. 42], expressly found that the appellant owned both the Bessemer and the Gloria R, and was the employer of both crews.

The finding that the crew of the Bessemer were employees of the appellant at time of collision completely overrules any possible finding that the vessel was operating under the charter made on September 11, 1941, expired October 1, 1942. (*This charter was never introduced into evidence, being marked for identification only* [A. 89].)

If the Bessemer were chartered to another, the crew would be employees of the charterer, not the owner, Van Camp Sea Food Company, Inc., appellant herein.

B. THE CREW OF THE BESSEMER HAD A CAUSE OF ACTION AGAINST THE OWNERS AND OPERATORS OF THE GLORIA R.

When at sea, the master of the crew of the Gloria R were under a legal duty to obey the rules of the road and maritime law, and to avoid colliding with the Bessemer, as well as any other vessel, in violation thereof.

The District Court found that the Gloria R breached that duty to the Bessemer, and that a collision resulted which was the fault of the Gloria R.

For every breach of duty, the law gives a remedy, in damages or otherwise, to the injured parties.

The Bessemer was damaged in said collision, she was laid up for repairs during the sardine fishing season, and as a result, the crew lost ten calendar days during the repair period. That loss of time was a real loss to the crew. If the collision were caused by a vessel owned by a stranger, there can be no doubt that the crew would be compensated in damages against the vessel at fault, and her owners under the *respondeat superior* doctrine.

In this case, the owner of the Gloria R was also the owner of the Bessemer and employed both crews.

Appellees submit that while they and the crew of the Gloria R had a common employer, *they were not in common employment* and therefore the fellow-servant rule does not apply; that the activities of the Gloria R on the high seas was one enterprise, under the master and crew of the Gloria R; and that of the Bessemer was distinctly another venture. Therefore, appellees did not assume the risk of negligent navigation by the crew of the Gloria R.



The rule which appellant really seeks to invoke to destroy appellees' cause of action is the fellow servant doctrine that one servant cannot sue his employer for the torts of his fellow servant. (As to personal injuries, the rule has been revoked by the Jones Act, 33 U. S. C. A. 688.) But the fellow servant rule has this all important restriction: That the servants must have a common master, and must be engaged in the same enterprise.

As stated in *Prosser, Torts*, p. 516:

*"If they were employed in separate departments of the same enterprise, the prevailing view was that they were not to be considered fellow-servants, unless their work was so related that they were likely to be in proximity to one another, and some special risk was to be anticipated toward one if the other were negligent."* (Emphasis added.)

A case precisely in point is *The Petrel* (1893), L. R. P. 326, 62 L. J. P. 92, which involved the crews of two commonly owned vessels, one of which negligently collided with the other. The crew of the innocent vessel sued for loss of personal effects and the exact defense was made in that case that appellant makes here. The opinion in *The Petrel* case held:

"I think therefore that probably no more complete definition can be formulated than is offered by the language of Blackburn, J., 'The consideration that the risk of injury to one servant is the natural and necessary consequence of misconduct in the other implies that the skill and care of the one is of special importance to the other by reason of the relations between their services.'

"Tried by this principle, can it be said that the safety of the captain of one ship of a company is in

the ordinary and natural course of things dependent on the skill and care of the captain of another ship of the same company, or that injury by the negligence of one is an ordinary risk of the service of the other? In some cases it might, perhaps. For example, it might if all the ships of the company were in the habit of meeting at the same dock, and the safety of each thus became, in the ordinary course of things, dependent upon the skill with which the other was navigated. But in regard to navigation on the high seas, or in the estuary of the Thames, would a captain of one ship of the General Steamship Navigation Company have more reason to be interested in the skill of a captain of another ship of the company than in that of the masters of the myriad other craft in whose vicinity he might happen to navigate? By no reasonable supposition can it be imagined that he would. I think, therefore, that these two captains were not in common employment."

Not being in common employment, the crew of the damaged vessel was granted recovery against the owner of the guilty vessel, their employer.

The argument advanced by appellant to defeat recovery in this case is, appellees, submit, without merit. Appellant admits that if the Gloria R was owned by a third person, recovery would be conceded. In such a case, the owners of the Bessemer would sue for loss of time suffered by themselves and the crew; but here, appellant argues, the owner of one vessel cannot sue himself as owner of another vessel, in such a case there could be no suit and so nothing for the crew.

But right there is where the fallacy lies. In the case of suit against a third person, the owners sue on behalf of themselves and on behalf of the crew. In so far as the crew is concerned, the owners are *trustees* of that part of the cause of action representing the crew's loss. As said by this Court in *The Lydia*, 21 F. (2d) 683:

"It is clear from the foregoing and other like decisions that the funds received by the owners in a case such as this are *charged with a trust* for the payment of the claims of the officers and crew of the vessel." (Emphasis added.)

In *U. S. v. Peterson*, 28 F. (2d) 29, the Court said in a similar case:

"Under the facts, it became the right and duty of the owners of the ship to bring action. *They are trustees for any money that may be recovered for damages caused by the interference with the voyage, and are charged with a trust for the payment of the claims of the officers and crew of the vessel.*" (Emphasis added.)

Since the owner-trustee is legally incapacitated to sue for the benefit of his *cestui que trust*, it is elementary equity law that the beneficiary may sue in his own name. That is precisely what the crew has done here, the libelant is a member of the crew and sues in his own name and for the benefit of the remainder of the crew.

The cases involving subrogation of insurers in collision cases are not in point at all here, because the crew of the

Bessemer were not recipients of any rights by way of subrogation. The loss of fishing time was a direct, primary loss which each fisherman suffered.

A somewhat analogous case to the one at bar is the one involving the salvaging of one vessel by the crew of another vessel which is owned by the same person as the distressed vessel. It is settled that recovery will be allowed in such a case, common employer notwithstanding.

*Rees et al. v. United States*, 134 Fed. 146;

*Jacobson v. Panama Co.*, 266 Fed. 344.

The cases cited by appellant do not support its position. The actual points involved in all of them were on *pleading* questions as to proper or necessary parties plaintiff. The present day rule as to parties is that the real parties in interest are the proper parties plaintiff (Rule 17a of Rules of Civil Procedure, Rule 37 of Equity Rules). *Lewis v. Chadburne*, 54 Me. 484, was decided in 1865; *Grazier v. Atwood*, 4 Pick. (Mass.) 234, in 1826; certainly rules of pleading has been liberalized since then. It can hardly be conceived that today a court would non-suit a plaintiff because he sued in his own name for a recovery that was due him. Likewise, the case of *Baxter v. Rodman* (1826), 3 Pick. (Mass.) 435, actually only decided that the owner could bring a representative suit for himself and crew. *Taber v. Jenny* (D. C. Mass. 1865), 23 Fed. Cas. 13270, is not good law on pleading; the present day rule as to real parties in interest was developed to remedy the very situation created by such a case as the cited one.



At any rate, none of the cases cited by appellant deal with a situation where the owner of the vessel was incapacitated to sue on behalf of his crew.

Appellees do not contend that they have actual title to any fish caught. The cases cited by appellants only deal with the question of title to such fish. Appellees do contend that they have a contract right to be paid wages out of such catch. It is necessary to note, though, that fishermen have a lien *in rem* against the fish caught for their wages, computed on a share basis (56 Corp. Juris 1065). Appellees contend that as a result of the tort of appellant's employees, they lost the chance to fish for ten days. That "chance to fish" had an economic value to appellees; it was a chance to earn wages, and that economic value is compensated by damages *when tortiously interfered with*.

Appellants argue that before there is a duty to share the profits, there must be a showing that there are profits, and that when two boats of the same ownership collide, the owner has made no profits, but a loss to the extent each boat is damaged. Our answer is that the loss to the owner is self-evident, and that the question in this case goes further; the owner has sustained a further loss because of his responsibility for acts of his employees on the Gloria R.

Suppose the Bessemer were hit by a vessel owned by a third party. The appellants would have made no profits during the time she were laid up for repairs, but certainly the appellant would sue for and recover damages for loss

of fishing time. Their recovery would be partly their own, and partly for the crew, *who also lost fishing time*. If the crew have the right to recover, even through the mechanics of the owner suing for their benefit, for loss of fishing time when such is due to the fault of a stranger-owned vessel colliding with their vessel, they do not lose that right merely because the vessel at fault was also owned by their employer. Only the mechanics need be altered. Instead of the owner of their vessel suing to recover for their benefit, the crew sues in their own name and on their own behalf, not their employer, as such, but the owner and employer of the offending vessel, who by chance happens to be their employer as well.

There is no new field of recovery opened by this decree. This exception to the fellow-servant doctrine has been long and well established (*Prosser, Torts, supra*).

Appellant next argues that the vessel could have been laid up by it at any time. No reference to the record is made to support that or other like assertions. Appellees deny such to be true.

Appellant states that appellees could quit the vessel (p. 28), but does not go on to state that the working agreement between the union, master of the boat, appellant's employee, and the crew provided that the crew members may not be discharged [A. 306]. Appellees hesitate to cite this portion of the apostles, as it is the record of the first hearing before Judge Harrison and so has no place in this record at all. The citation is made without prejudice.

III.

**On the Date of the Collision, the Charter Party of September 11, 1941, Was Not in Effect, and the Bessemer Was Not Operated by the Crew Under Any Charter From Appellant, but as Employees of Appellant.**

A. THERE WAS NO CHARTER-PARTY INTRODUCED INTO EVIDENCE UPON THE TRIAL BEFORE JUDGE HALL.

The document executed October 11, 1941, Libelant's Exhibit No. 1 for identification, was "introduced for the purpose of identification only" [A. 89] and it was ordered so marked. It therefore never became part of the evidence in the case [A. 129] and is not now properly before this Court as evidence.

Anthony Di Leva, master of the Bessemer, testified that during the sardine season in question here there was not any written agreement between him and appellant [A. 95].

Therefore, the document containing the alleged waiver of liability, relied upon by appellant, is simply not in evidence and is no part of this case.

If appellant wanted the benefit of this document, it should have introduced it into evidence. But such action would have been inconsistent with their position before Judge Hall that the Bessemer's crew were employees.

B. THE ACTS AND ADMISSIONS OF APPELLANT ESTABLISHED BEYOND DOUBT THAT THE CREW OF THE BESSEMER WERE ITS EMPLOYEES, AND THAT THE CREW OF THE BESSEMER WERE NOT EMPLOYEES OF ANY CHARTERER OF THE BESSEMER.

The admissions of the Answer to the Fifth Amended Libel, paragraphs I, II, III and IV [A. 28-31], are clear and unequivocal that the master and entire crew of the Bessemer were employees of appellant and that the "right

to control of the crew and master remained in respondent, Van Camp Sea Food Company, Inc., and was at all times exercised by said respondent" [A. 28]. In paragraph I [A. 28], appellant "denies that libelant was in possession of said vessel in any capacity other than that of an employee of respondent."

Such an employer-employee relationship is entirely inconsistent with an owner-charterer relationship between the appellant and the master and crew of the Bessemer; and the appellant, having admitted and treated appellees as employees, cannot, in the next breath, claim they are only charters, to escape just liability for the torts of other employees.

No clearer language, that the appellant did not demise or bareboat charter the Bessemer to appellees, can be found than in paragraph V of the Answer [A. 31]:

"Respondents deny that said respondent Gennaro Di Leva was a demise or bareboat charterer or chartered the vessel in any manner whatsoever, *but allege that the said vessel Gloria R was being operated on shares in the same manner as said vessel Bessemer was being operated. . . .*"

C. THE APPELLANT DID NOT PLEAD THE WAIVER OF LIABILITY CLAUSE IN THE PURPORTED CHARTER OF OCTOBER 11, 1941.

There was no issue as to the waiver of liability clause of the purported charter of October 11, 1941, in that the appellant did not plead the same, or its legal effect, in any manner in its answer to the Fifth Amended Libel [A. 28-36]. Not being plead, any argument as to it now is on a point outside the issues. It certainly is an affirmative defense, which must be pleaded. Under no circumstances, can the point be raised on appeal for the first time.



IV.

**The District Court Was Correct in Finding That the Gloria R Was Solely at Fault in the Collision.**

**A. THE BESSEMER HAD A PROPER LOOKOUT AND THE GLORIA R WAS AT ALL TIMES OBSERVED BY THE BESSEMER.**

The Gloria R was at all times observed by the master of the Bessemer, who first saw the Gloria R when the vessel was two or three miles away [A. 81], he saw the Gloria R all the time after that. As Di Leva, master of the Bessemer, testified:

“I seen him all the time. I was listening for the fish, and I observed his course. We made a circle, he was heading toward the Island, and while we were circling the fish, his course was to the east end all the time. . . . Then as we started to make the clockwise turn, he headed out in this direction here. . . . I seen his red light all the time [A. 81-82]. . . . We were completing our circle here. All of a sudden—I *was looking at them all the time*—I seen his red and green. . . . All of a sudden he turned his green lights towards us. Then I hollered at my father to back up [A. 83]. . . . All of a sudden he turned, he changed his course to cut across our bow, he came like this right straight in front of our bow” [A. 84].

The master of the Bessemer acted as a lookout. He was the mastman [A. 98], stationed on the top mast. He was on the lookout for fish, but he “seen the Gloria R all the time” [A. 91]. He gave orders concerning the navigation of the Bessemer.

This testimony establishes beyond doubt that the master of the Bessemer personally kept a proper lookout, that he

was stationed high upon the mast where he had perfectly unobstructed vision, and that he had the Gloria R. under continuous observation at all times. Therefore, Article 29 of the International Rules was fully complied with by the Bessemer.

If a point be made that the lookout was not stationed on the forward deck, our answer is that the placement of the lookout is immaterial so long as he has unobstructed and clear vision. *The Lake Monroe*, 270 Fed. 858, Aff. 271 Fed. 474, is precisely in point. As said the Court there (270 Fed. 862):

“Under the decision in *The Scagmore*, 247 Fed. 743 (C. C. A. 1st), probably the steamer’s lookout should have been posted in the forward deck, but that fault, if fault it were, in no way entered into the accident. There was no failure of lookout on either vessel. Each seasonably discovered the other, and kept the other under continuous observation. The dispute is as to the courses the vessels took.”

#### B. THE BESSEMER DID NOT FAIL TO EXERCISE DUE CARE IN ANY SPECIAL CIRCUMSTANCE SITUATION.

The appellant attempts to make much of the fact that at times the Bessemer circled clockwise over the fish. But the evidence was clear that in looking for fish or in attempting to round them up or to get in the most favorable position for lowering the net, the Bessemer was free to turn in any manner whatsoever and that there was no “custom,” as claimed by appellant [A. 97, 98, 126, 127]. The only customary thing was that when a set was commenced to be made by the lowering of the net into the water, it was done from the port side of the vessel by a counter-clockwise movement of the vessel. At the time of the collision,

the Bessemer had not commenced to lower her net. Furthermore, the circle to the right of the Bessemer was commenced before the Gloria R approached, and the Bessemer was completing that circle when the Gloria R changed her course and cut across the Bessemer's bow [A. 83].

In so far as the red mast light is concerned, the evidence was conflicting as to whether there was a local custom that the red mast light should be lit when fish were located, or only when the net was actually lowered in the water [A. 110, 111]. The master of the Gloria R admitted that there was no custom; that "They do it both ways" [A. 151]. At any rate, the Bessemer was at all times observed by the Gloria R, and the absence of a red mast light gave the Gloria R no cause to alter her course and cut across the bow of the Bessemer and so collide with the Bessemer.

C. THE EVIDENCE AFFIRMATIVELY SHOWS WITHOUT CONFLICT THAT THE ABSENCE OF A WHITE MAST LIGHT COULD NOT HAVE BEEN A CAUSE OF THE COLLISION.

The master of the Gloria R, Di Leva, who was in the crow's nest on the mast of the Gloria R the night of the collision [A. 135], testified that when his vessel *approached* the Island, he saw the green running lights of the Bessemer; that the bow of the Bessemer was in an easterly direction; that the Bessemer was about a mile away then [A. 137], at position No. 1 on Respondent's diagram [A. 139]; at position No. 2 on the diagram, the Bessemer was in the same position, "all we seen was his green light" [A. 139]; the Bessemer was always in one position with her bow in easterly direction, and "we could have cleared her stern by a good 50 feet" [A. 141-143]. The Court asked the master of the Gloria R:

“Did you see the Bessemer *at all times*? A. Yes.”  
[A. 148.]

The master of the Gloria R further testified that on the way home he was looking for fish, and that once in a while he would look over and see the Bessemer, see his green light always; and as the Gloria R came homewards, the master knew that his course would bring him close to the Bessemer [A. 150]; he had passed the Bessemer by a mile going out, and could have cleared him, as only the two boats were there [A. 150].

“Court: You saw him there and you saw the boat? A. That is right.” [A. 151.]

Jacob Pugliese, who was stationed at the bow of the Gloria R [A. 155], testified that as the Gloria R proceeded north towards San Pedro, he saw the green light of the Bessemer and could faintly see the shape of the boat [A. 155], about a mile away [A. 159].

Nicola Curci, the lookout of the Gloria R, was standing next to the wheel, *saw the Bessemer one mile away* [A. 166].

Biago Cummo, the wheelman of the Gloria R, first saw the Bessemer *a mile ahead* [A. 174, 175].

In *Lind v. U. S.*, 156 F. (2d) 231, the libelant's fishing vessel did not carry mast lights as required by 79(d) (First) of Title 33 U. S. C. A. for a vessel engaged in traveling; *i. e.*, in place of a mast head light, a “tri-colored lantern.” She was run down by respondent's vessel, and because of the absence of the required mast light, the District Court divided the damages. The Circuit Court reversed, holding as follows:

“The whole case turns on the ‘Mary’s’ fault . . . the failure to carry the regulation light was relevant



only so far as its presence misled, or could have misled, those aboard the 'Doubleday' as to the 'Mary's' future positions. The 'Mary' was seen 30 minutes before the collision when four miles away . . . the presence of a green light would not have changed the navigation of the 'Doubleday' . . . libelants have proved beyond a reasonable doubt that the failure to carry proper lights did not contribute to the collision."

A case also precisely in point is that of the *Redwood and Sun D'E* (C. C. A. 9th), 81 F. (2d) 680, where under similar facts, this Court held:

"The cross-appellant charges that the 'Sun D'E's' lights were in accordance with the Inland Rules of Navigation and not in accordance with the International Rules . . . and cross-appellee admits this to be true. However, the court found that the 'Sun D'E's' lights were in place and burning brightly. Moreover, it affirmatively appears from the testimony that the non-compliance with the International Rules in this instance could not possibly have caused the accident, for cross-appellant's witnesses saw the 'Sun D'E' when she was about half a mile away and any purpose served by the lights could not have aided more than an actual view of the vessel."

When the Bessemer and Gloria R were red to red, the Gloria R was obligated to hold her course. The presence or absence of a white mast light could have in no manner changed the obligation of the Gloria R to so navigate. The absence of a white mast light could not have possibly caused him to cross the bow of the Bessemer, as the Court found the Gloria R did [A. 43]. Therefore, damages should not be divided.

V.

**The District Court Did Not Err in Computing Damages.**

Libelant placed in evidence a statement from the Division of Fish and Game of the State of California, Libelant's Exhibit No. 3 [A. 130], which set forth the daily catch of sardines of the Bessemer from October 14, 1944 to December 31, 1944, according to the daily deliveries of the vessel.

Judge Hall computed damages as follows [A. 194]: He took October and November as average months; from October 14th to the end of November was 45 calendar days; *i. e.*, while they did not fish every day, there is a total number of 45 days and a total quantity of fish of 1,047,450 plus 896,850, and 45 days into that total quantity of fish was an average of 43,206 pounds of fish caught each day. That is not a fishing day, that is a day [A. 194] . . . for 10 calendar days lost by the Bessemer [4th to 13th, inclusive], 432,000 pounds of fish, 216 tons at \$22.00 a ton would make \$4,752.00 [A. 196].

Judge Hall expressly refused to compute damages as contended for by appellant [A. 194-197, 202-203].

The deduction for fuel was based upon an agreed sum of \$406.55 for the 45 days chosen by the Court. This averages to \$90.34 for 10 days [A. 198].

Gross damage	\$4,752.00
Less fuel—10 days	90.34
	<hr/>
	\$4,661.66

The next computation is to divide the remaining amount into  $18\frac{3}{4}$  shares. This gives a result of \$248.62 per share [A. 199].

The grocery bill for the 45 days was agreed to be \$550.00. This was for 13 men. This would average to be \$12.22 per day for 13 men, or \$.94 per day for one man, or \$9.40 per man for 10 days.

Crewman's share	\$248.62
Less groceries, 10 days	9.40
	<hr/>
<i>Clear per share</i>	\$239.22
	<hr/> <hr/>

The master, Anthony Di Leva, received one share, \$239.22, plus one-half share from vessel, which stood no groceries.

Crewman's share, clear	\$239.22
Bonus— $\frac{1}{2}$ boat share	124.31
	<hr/>
Master's earnings	\$363.53
	<hr/> <hr/>

The owner of the net took  $2\frac{1}{2}$  shares of the boat's shares, and stood no groceries, and so received \$621.65.

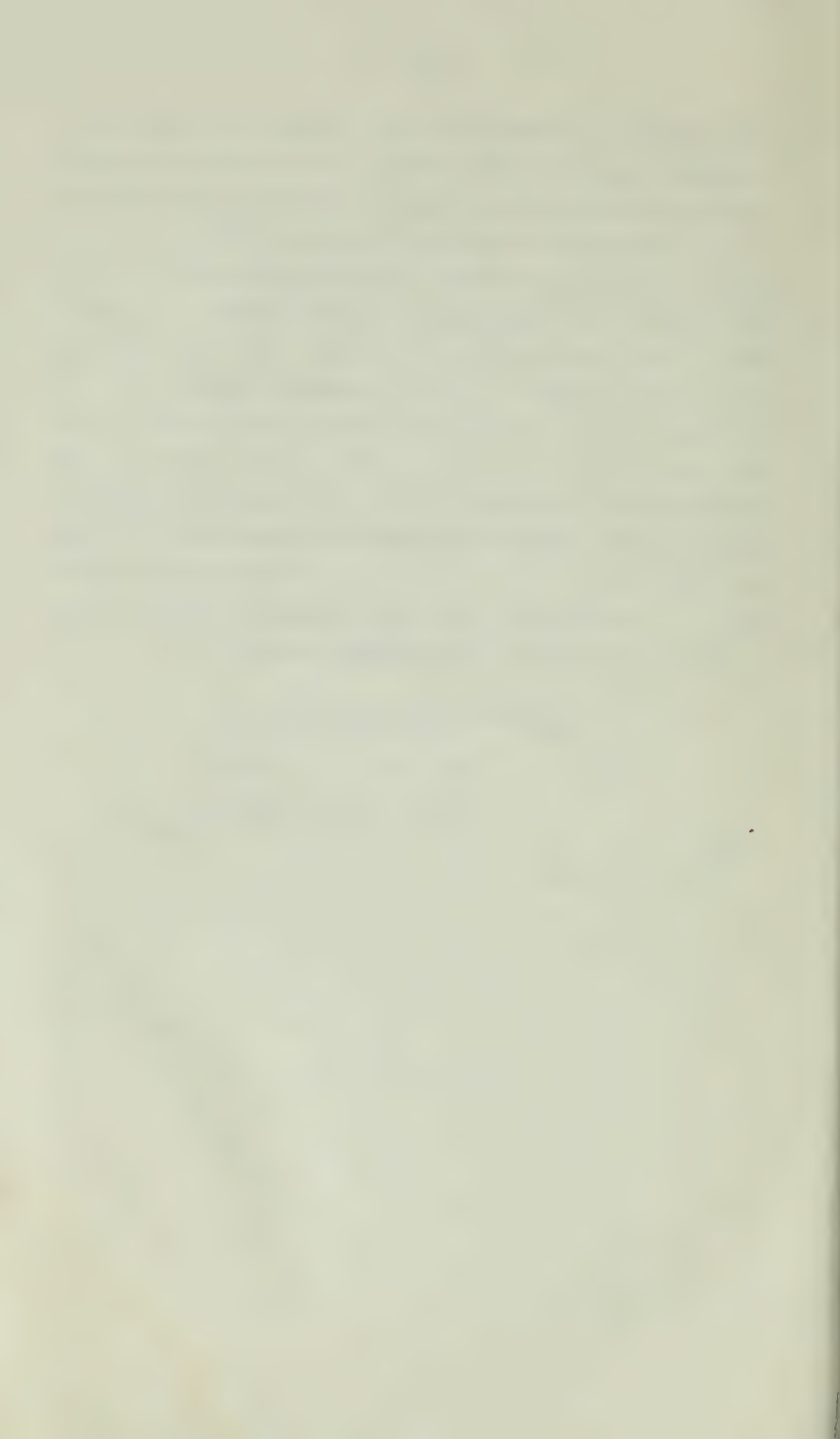
Appellees submit that the method used by the Court was a fair one. If anything, the method is too favorable to the appellants, because during the time from October 14 to November 30, 1944, there were Saturdays, Sundays, and a week of full moon, during all of which days the vessels do not go out for fish. So the catch from October 14 to November 30 should be divided by a figure considerably less. If such were the method used, then there would be sense to using the number of fishing days lost by the Bessemer. But the Court used the calendar day count, and his discretion in this matter should not be disturbed.

As stated in *Atchison, T. & S. F. Ry. Co. v. California Sea Foods Co.*, 51 F. (2d) 466 (C. C. A. 9th), there must be proven a reasonable certainty of pecuniary loss, and not a mere inconvenience arising from an inability to use the vessel. Appellees sustained this burden. The collision took place on the first day of the sardine season. Appellees proved that they consistently caught fish the remaining days of the season in 1944 [Libelant's Exhibit No. 3]. Appellees further proved that during the days the Bessemer was laid up for repairs, other seiners came in with full loads [A. 85-86]. Appellee thus put the Bessemer within the rule of *The Columbia*, Fed. Cas. No. 3,035, cited with approval in the *Atchison* case, *supra*, where allowance was made for the catch lost because the accident happened "at the height of the fishing season."

Respectfully submitted,

HERBERT R. LANDE,  
*Proctor for Appellees.*





No. 11877

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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VAN CAMP SEA FOOD COMPANY, INC., a corporation,  
*Appellant,*

*vs.*

ANTHONY DiLEVA, IVAN JURJEV, MARIE DiLEVA, MIKE  
DiLEVA, SALVATORE DiLEVA, JACK OLSEN, MARINO  
TRANSATTI, ANGELO CASTAGNOLA, CHIGI ROMOLIO,  
SALVATORE CARNAVALE, MATTEO BOLOGNA, PASQUALE  
GUGLIELMO and PIETRO COLOMBO,  
*Appellees.*

---

## REPLY BRIEF FOR APPELLANT.

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FILED

AUG 7 - 1948

AUL P. O'BRIEN,



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GUGLIELMO and PIETRO COLOMBO,

*Appellees.*

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**REPLY BRIEF FOR APPELLANT.**

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**Introduction.**

Appellant proposes in this Reply Brief merely to clarify several errors which appear in Appellees' Brief. No effort will be made to reargue or restate appellant's position which is fully set forth in the Opening Brief.

**I.**

**Any Presumption of Correctness of the District  
Court's Decree Is Slight.**

The District Judges who heard this case came to opposite conclusions as to the effect of the charter party agreement. Judge Harrison was *convinced* that the charter party agreement "by the conduct and acquiescence of the

parties continued in effect at the time of the collision.” “If I am correct in this respect,” he continued [A. 15], “the fishermen were not employees of the respondent. It has been intimated that the GLORIA R. was being operated under a similar agreement. If such is true the charterers of the GLORIA R. would be the proper respondents.” If the “charterers” of the GLORIA R. are “the proper respondents” surely appellant is a “wrong party.” This is the only conclusion that can be drawn from the statement of Judge Harrison to appellees’ counsel [A. 316]. If the second Di Leva (*i. e.*, the GLORIA R. DI LEVA) is not in it you will get a judgment against you . . . .”

The process by which Judge Hall regarded the Memorandum Opinion as a “vacation of the trial” [A. 67] does not appear in view of the fact that certain questions only were undecided by Judge Harrison and were to be left open “for further argument.”

Appellant believes that the proper procedure should have been that pursued by the District Judge in the case of

*L. R. Connett & Co. v. The Republic No. 5* (S. D. N. Y. 1941), 43 Fed. Supp. 245, 1942 A. M. C. 176,

in which the libelant was not permitted to add another party midway in the trial, but was left to his remedy against the proper party in a new action.

As to the questions of fact arising out of the circumstances of the collision itself, there is of course a strong presumption of correctness despite the fact that all of appellant’s witnesses in the key positions testified and only a careful selection of appellees’ men were produced.

As to the questions of law arising out of the statutory violations of the BESSEMER no similar presumption exists.

II.

**The “Charter Party” Was Properly Before the Court  
on Both Trials of This Case.**

In the first trial it was stipulated that the contract was to be introduced into evidence [A. 295].

In the second case it was marked for identification and in answer to the Court’s questions [A. 95] Appellee DiLeva stated that they operated the boat under the charter until October 1, 1942, that thereafter they took the boat out and did the same things they had previously done under the charter, received the same share and it was the “same thing; yes, all the time. All the way through” and that the same arrangement prevailed “continually up to the date of the accident.” Judge Hall followed the course which Justice Frankfurter since referred to, in the case of

*Johnson v. U. S.* (1948), .....U. S. ...., 68 S. Ct.  
391, 92 L. Ed. 416, 1948 A. M. C. 218, 224,

when he said “Federal judges are not referees at prize fights but functionaries of justice.” The Judge questioned appellees’ master to ascertain that they were operating at the time of the collision under the terms of the charter, “all the way through.” Appellees are here attempting to play “a game of blind man’s bluff” and would have this Court blindfold itself to the agreement. The specific testimony of their witness, who examined the document, was that *these* were the terms under which they operated continually up to the date of the accident, “all the way



through.” The wording of the document is in evidence, by reference with like effect as if it had been read *verbatim* into the record by the witness. In no other way could the Court know what were the terms of their contract of employment.

It is and has been the consistent position of appellant that these men are employees. This position was pleaded in the Answer to the Fifth Amended Complaint in which [A. 30, 31] it is admitted that appellee was operating the vessel pursuant to an agreement with appellant and “that said agreement created the relationship of employer and employee” between the parties. In Article III of the Answer [A. 30] it was denied that Appellee Salvatore DiLeva had any right to sue for himself or on behalf of any crew members or master of the vessel.

The “charter party” was actually the employment agreement cast in the terms of a bareboat charter. It was effective as a contract, one of the explicit terms of which was to preclude liability for this very type of damage.

The provision, which appellees are so anxious to avoid, is merely a restatement of the relationship between these employees and their employer, as to loss of use. Inherent in the employment contract of fishermen on shares, is the prohibition of any right to sue for detention damage. The cases establishing this rule (which have been cited with approval by this Court) are discussed on pages 21-29 of Appellant’s Opening Brief.

III.

**The Case of the Petrel Is Not in Point.**

In the case of

*The Petrel* (1893), L. R. P. 326, L. J. P. 92, cited by appellees and discussed in Appellant's Brief (App. Br. p. 26), it is to be noted that the crew members had clear title to the subject of the cause of action. They owned the personal effects involved. To say that this case is in point is to beg the question of whether or not appellees have any rights whatsoever in the cause of action for detention damages other than to share any *actual* recovery. Appellant strongly urges that such cause of action could only have arisen in the owner of the BESSEMER, and the crew's rights depend entirely upon whether or not the owner had a cause of action. If the owner had no right to sue, as here, the crew members have no right to compel him to sue.

The Court in the case of *The Petrel* (*supra*) also pointed out that, where ships of the same company met at the same dock (as in the instant case) and depended upon the skill with which other ships of the same company were operated, it might well be a case in which the crew were fellow servants. In this case the vessels of appellant embarked and discharged at the same dock, were all engaged upon the same mission (fishing for sardines) in the same general area (waters immediately adjacent to San Pedro). They were bound to come into the vicinity of other vessels of appellant which were also pursuing schools of fish. If more than one vessel sighted the same school before it was captured, or before the first vessel commenced to "set," the "safety of each thus became in

the ordinary course of things dependent upon the skill with which the other was navigated.”

The Jones Act (46 U. S. C. A. Sec. 688) altered the common law fellow servant rule in personal injury cases only. It is of course not applicable to this case.

#### IV.

### No “Trust” Arises in Favor of the Crew Members When There Is No Cause of Action for Detention Damage Because the Owner Cannot Sue Himself.

The “trustee” theory, relied upon by appellees, becomes entirely untenable when we consider that the quotations and cases cited by appellees refer only to the situation in which there is a trust *res*, either money *actually* recovered by the owner by sale of the fish or damages recovered for its value, or an *existing* cause of action for that value. Here appellees would have this Court create an entirely new cause of action where none existed before, in favor of the fishermen. This Court in the case of

*The Lydia* (C. C. A. 9th 1928), 24 F. (2d) 683,  
1928 A. M. C. 700,

adopted the statement “They have no title to the property and could maintain no action for it.”

Appellees admit that the crew has no title to the fish caught by the vessel. If the “net proceeds” of the fishing expedition is a law suit the fishermen likewise have no “title” to it. They have merely the contingent right to be paid their share of what the owner can recover for them. If he can recover nothing because there is no liability on the part of the party sued, or if there is no cause of action, there is nothing to share.

V.

**The Statutory Violations of the Bessemer Were Not Proved to Be Neither a Cause nor a Possible Cause of the Collision.**

**A. The Lookout Was Primarily an Observer of Fish, Not a "Free and Single-Minded Lookout."**

If the "Lookout" or "mastman" on the BESSEMER had any duty to observe other vessels, that duty was entirely incidental to his job of directing the pursuit of the school of fish. Appellee Anthony DiLeva indicates [A. 98] that the mastman's job is "to look for fish" and that he was looking at the fish and "seen the GLORIA R. all the time" [A. 99]. Surely it cannot be asserted that this man, who was the only claimed lookout, could possibly be giving his undivided attention to the GLORIA R. Had he been paying sole attention to the other vessel in all probability he would not have completed the turn [A. 83].

**B. Extra Care Should Have Been Exercised by the BESSEMER in View of the Unusual Circling Maneuver, and Special Circumstances Presented.**

Appellee Anthony Di Leva states [A. 79] that two counterclockwise circles were made. (This was the usual direction [A. 97] of the circle.) Then "all of a sudden the fish were traveling" and they made a third circle clockwise. This was more convenient to follow the unpredictable movement of the school. Inasmuch as this third circling by the BESSEMER was an unusual starboard turn, it should have required extra care to avoid collision. They completed the circle [A. 83] even if it meant turning into the side of the GLORIA R!



C. The Absence of a White Masthead Light on the BESSEMER Was a Contributing Cause of the Collision.

The statutory rule, requiring a white masthead light on a different plane from the red and green running lights, has a definite purpose. Its presence is to allow other vessels more quickly and certainly to identify a vessel's course or to recognize a change in course. The masthead light may be inconvenient to the fisherman, "because it throws light and you can't see the fish" [A. 111], but nothing will excuse its absence. In the case of

*Lind v. U. S.* (C. C. A. (2d) 1946), 156 F. (2d) 231,

and the

*Sun D'E* (C. C. A. 9th, 1936), 81 F. (2d) 680 (cited by appellees), the Court found that the white masthead light was lighted.

The BESSEMER's testimony indicates that that vessel was completing a starboard circle. The GLORIA R's testimony likewise describes a turning maneuver. The BESSEMER, at the time of the collision, struck the GLORIA R at about or a little forward of amidships on a 78-foot vessel [A. 248]. The GLORIA R according to both masters was going at a speed of eight knots [A. 254; 215], 800 feet per minute (a knot is a nautical mile, or 6000 feet, per hour), or  $13\frac{1}{3}$  feet per second. Had the GLORIA R had but three seconds more she *might* have cleared! In three seconds she moved 40 feet through the water, in four seconds 53 feet, in five seconds 67 feet, in six seconds 80 feet. If the BESSEMER's white masthead light had been lighted, the rate and direction of the turn would have been indicated to the GLORIA R substantially sooner than it actually was. Prompt indication of the course or a turn is the very purpose of the required light!

Appellees must establish that it was *impossible* for the GLORIA R to have avoided the collision if the white light had given the GLORIA R this *additional warning*. The rule of

*The Pennsylvania* (1874), 86 U. S. 125, 136, 22 L. Ed. 148,

requires appellees to prove not only that these statutory violations *did not* contribute to the accident, but also that each of them *could not have been one of the causes*. This is the settled holding even in

*The Scagmore* (C. C. A. 1 at 1917), 247 Fed. 743 (cited by appellants).

## VI.

### The Salvage Cases Cited by Appellees Are Not in Point for the Proposition That Fishermen Can Sue Their Employer for Detention Damage.

It is well settled that mariners have an independent right to sue in their own names for salvage service.

*Benedict on Admiralty* (6th Ed.), Vol. I, p. 343.

Their rights do not exist through the owner or only in so far as the owner has rights to salvage. The owner cannot release their claims.

*The Neptune* (C. C. A. 2d, 1921), 277 Fed. 230.

They thus have "title" to the cause of action for salvage. It is immaterial that they can sue their owner-employer when their salvage efforts exceed the normal requirements of their duty to their ship.

In the case at bar, the fishermen have the right to share in the proceeds of the voyage only in so far as the owner makes an actual recovery. They have no independent rights.

VII.

**Damages Are Incorrectly Assessed.**

Appellees have made no effort to answer Appellant's proposition that there are nine calendar days from October 4th to October 12th and that the District Judge used ten calendar days for this period. The Court also approximated 45 days for the period October 14th to November 30th. Actually there are 48 calendar days during this period. Using the District Court's own formula, with the proper divisors, the maximum award (even granting the liability question for the sake of argument) would be \$2,346.24 as computed in Appellant's Brief [Appendix 7].

Appellees in discussing damages (Appellees' Br. p. 19), carefully avoid the statement that 10 calendar days were lost or that there remained 45 days to the end of November except in so far as they indorse the District Court's error. On page 5 of their brief, however, appellees make the casual but flat statement that ten calendar days were lost. The same error appears on page 10.

VIII.

**Conclusion.**

Appellants therefore submit that the District Court's decree should be reversed and the libel be dismissed.

Respectfully submitted,

McCUTCHEN, THOMAS, MATTHEW,  
GRIFFITHS & GREENE,  
HAROLD A. BLACK,  
GEORGE E. TONER,

*Proctors for Appellant.*





